

VERMONT ZONING AND SUBDIVISION LAW

Second Edition

Including Notations to Decisions
of the Vermont Environmental Court

Prepared for the Vermont Bar Association's
Environmental Law Practice Manual

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TABLE OF CONTENTS

I.	Introduction	1
II.	Planning Commission Review	4
	A. Subdivision Review	5
	B. Interplay of Subdivision and Site Plan Regulations	9
	C. Jurisdiction for Site Plan Review	10
	D. Site Plan Review Standards	12
	E. Generally Applicable Regulations	16
	F. Permissible Regulations	18
III.	Board of Adjustment Review	24
	A. General Jurisdiction	24
	B. Hearings and Evidence	25
	C. Conditional Use	26
	D. Variances	29
	E. Appeals of Decisions of Zoning Administrator	34
IV.	Development Review Boards	36
V.	Other Issues	37
	A. Impact Fees	37
	B. Deemed Approval	39
	C. Notice and Finality	41
VI.	Appeals	44
VII.	Stays Pending Appeal	54
VIII.	Penalties for Zoning Non-Compliance	55
IX.	Zoning Enforcement	56
Attachments		
	Attachment 1 – Planning Goals	58
	Attachment 2 – Planning Commission Planning Responsibilities as Set Forth in 24 V.S.A. § 4325.	62
	Attachment 3 – Procedures for Adopting Zoning Bylaws	64
	Attachment 4 – Plats and Property Descriptions	65
	Attachment 5 – Historic Preservation Federal and State Income Tax Credits	67
	Attachment 6 – Things to Look For in a Zoning Ordinance	69
	Attachment 7 – Making your Presentation	71
	Attachment 8 – Rules for Environmental Court Proceedings	73
	Attachment 9 – Comparison of 24 V.S.A. Chapter 117 Before and After 2004 Permit Reform	85

I. Introduction

Municipalities affect their physical environment through planning and land use regulations. Through planning, a municipality, usually led by its planning commission, attempts to define its future development patterns. State law directs planning commissions to “engage in a continuing planning process” to implement the goals listed in 24 V.S.A. §§ 4302(b) and (c), popularly known as the Vermont Planning and Development Act or Act 115. (See Attachment 1). To enable plan implementation, planning commissions lead in such areas as the adoption of zoning bylaws and capital budgeting as set forth in 24 V.S.A. § 4325. (See Attachment 2).

Another tool for implementing plans is land use regulation.¹ Following the adoption of zoning and subdivision bylaws, a zoning administrator reviews development projects.²

¹ Procedures for adopting such regulation are described by 24 V.S.A. §§ 4441–4442 and 4447 and are summarized in Attachment 3. Municipal charters may alter general zoning law. A zoning ordinance may be challenged based on violations of adoption procedures for only two years. *In re: Appeal of Robert and Tay Simpson*, Docket No. E95-092 (Vt. Env'tl. Ct., Mar. 13, 1996); 24 V.S.A. § 4483. One less obvious area for challenge may be the absence of reports necessary to support the creation of design control districts. 24 V.S.A. § 4414(1)(E) requires planning commissions to prepare a report describing, among other things, recommended planning and design criteria to guide future development in design control districts. The Supreme Court of Vermont indicated an intent to read design control district adoption documents narrowly, and thus the law, strictly in *Village of Woodstock v. Bahramian*, 160 Vt. 417, 631 A.2d 1129 (1993).

Another area of challenge is 24 V.S.A. § 4401 authorizing the adoption of zoning bylaws only when a municipality has an effective plan as described in 24 V.S.A. § 4382. Normally, a plan is effective only for five years. 24 V.S.A. § 4387(a). Yet another area of challenge may be the strict public notice requirements in 24 V.S.A. § 4444.

Although neither 24 V.S.A. § 1972 nor § 4442 require referendum approval of an ordinance that has been adopted by the legislative body of an urban municipality, nothing prohibits a legislative body from writing into an ordinance a requirement for such voter approval before the ordinance may take effect. *Village of Ludlow v. William S. Kennedy, Francine Kawasch-Kennedy, Sheila Kawasch, and Ludlow Cooking Co.*, Docket No. 212-11-99 Vtec (Vt. Env'tl. Ct., Mar. 17, 2000).

Zoning ordinances, like statutes, are to be construed if possible to make sense of all their parts so that no provision is superfluous. Generally, words not specifically defined in an ordinance or statute are given their common meaning. *In re: Appeal of Gary and Suzanne Gregoire*, Docket No. 47-3-98 Vtec (Vt. Env'tl. Ct., Jan. 14, 2002); *In re: Appeal of Heritage Museum of Vermont*, Docket No. 66-4-98 Vtec (Vt. Env'tl. Ct., July 6, 1998).

Because zoning laws are “in derogation of the common law,” ambiguities in zoning regulations and procedures are to be construed in favor of the landowner. *Appeal of Weeks*, 167 Vt. 551, 712 A.2d 907 (1998); see also *In re Appeal of Sisters and Brothers Investment Group, LLP*, Docket No. 2004-495 (May, 2005) (unpublished, Vt. Supreme Court) (three-justice panel decision); *In re: Appeal of John Larkin*, Docket No. 159-9-99 Vtec (Vt. Env'tl. Ct., May 29, 2000); *Town of Colchester v. Joanne Bergeron, In re: Appeal of Joanne Bergeron*, Docket Nos. 226-12-98 and 40-3-98 Vtec (Vt. Env'tl. Ct., June 19, 2000). This principle does not require (or even allow) the

Depending on the type of project and its dimensions, other local authorities may become involved in the process. 24 V.S.A. § 4433. In some towns, a Zoning Board of Adjustment (“ZBA”) reviews conditional use and variance applications while a planning commission reviews all other aspects of a project requiring review. In other towns, a Development Review Board (“DRB”) performs both functions. 24 V.S.A. § 4460(a). The ZBA or DRB and the planning commission in each municipality may be comprised of the same members. 24 V.S.A. § 4460. Table 1 compares statutory provisions governing the choice and service of the planning commission, ZBA members and DRB members. In most cases, each body can take action only with the approval of a majority of its membership.³

Court to disregard the context of the use of terms in a zoning regulation, however oddly or awkwardly drafted. *In re: Appeal of Steven and Mary Anne Freedman*, Docket No. 202-11-98 Vtec (Vt. Env'tl. Ct., July 12, 2000).

The purpose statement of zoning bylaws has no direct regulatory effect. *In re: Appeal of Munger*, Docket No. E95-053 (Vt. Env'tl. Ct., Aug. 28, 1995).

² 24 V.S.A. § 4448 discusses the appointment and powers of a zoning administrator. The Town Plan is merely an overall guide to community development. Although a plan may recommend many desirable approaches to that development, only those provisions incorporated in the bylaws are legally enforceable. The “intent” of the Town Plan does not provide a basis for disapproval of the project if the project meets all applicable regulations. *In re: Appeal of Alfred Duval*, Docket No. 129-7-98 Vtec (Vt. Env'tl. Ct., Feb. 11, 1998); *see also In re: Appeal of Agnes Mitchell Trust*, Docket No. 47-4-01 Vtec (Vt. Env'tl. Ct., Feb. 26, 2002).

³ An abstention cannot be regarded as an “expressed” assent even if in some circumstances it may be a tacit or passive acceptance of the action taken by those voting. *In re: Appeal of Philip A. Reynolds*, Docket No. 196-12-97 Vtec (Vt. Env'tl. Ct., Nov. 19, 1998), *aff'd In re: Reynolds*, 170 Vt. 352, 749 A.2d 1133 (2000).

If the common law rule were applied to count a disqualified member’s vote with the majority of those voting, that member’s vote could easily be cast by operation of the rule against her actual interest, that is, against the interest for which she abstained. For this reason, the common law treatment of an abstaining vote should not be applied in Vermont. *In re: Appeal of Philip A. Reynolds*, Docket No. 196-12-97 Vtec (Vt. Env'tl. Ct., Nov. 19, 1998).

When a nine member zoning board of adjustment has only six members present four votes is insufficient to approve a conditional use. *In re: Appeal of Todd and Terry Ashline*, Docket No. 278-12-00 Vtec (Vt. Env'tl. Ct., June 14, 2001).

TABLE 1

	Planning Commission/Citation	Zoning Board of Adjustment/Citation	Development Review Board
Number of Members	3-9 24 V.S.A. § 4322	3-9 24 V.S.A. § 4460(b)	5-9 24 V.S.A. § 4460(b)
Votes Necessary for Action	Probably a majority of entire membership. See 1 V.S.A. § 172	A majority of entire membership. 24 V.S.A. § 4461(a)	A majority of entire membership. 24 V.S.A. § 4461(a)
How Chosen	Usually appointed by legislative body. 24 V.S.A. § 4325	Always chosen by legislative body. 24 V.S.A. § 4460(c)	Appointed by legislative body. 24 V.S.A. § 4460(c)
Municipality of residence	A minority need not reside within municipality. 24 V.S.A. § 4322	No provision.	No provision.
Non-voting Ex Officio Members	Up to two. 24 V.S.A. § 4322	No provision.	No provision.
Removal during term	May be removed at any time by unanimous vote of legislative body. 24 V.S.A. § 4323(a).	For cause only. 24 V.S.A. § 4460(c)	For cause only. 24 V.S.A. § 4460(c)

In 2004, virtually all other types of environmental and land use law appeals were assigned to the Environmental Court, which added a second judge and staff to handle the increasing number and complexity of cases. Also, the zoning enabling statute, Title 24 Chapter 117, was substantially revised. This publication describes the revised requirements. To the extent towns legally adopted substantive zoning provisions that are inconsistent with current law, such provisions likely apply until September 1, 2011, by which time they must conform to the revised enabling statute. In general, all amendments to procedural requirements took effect on September 1, 2005. 24 V.S.A. § 4481. Attachment 9 tracks the provisions of the previous and revised statutes.

Since 2001, copies of the Environmental Court's decisions have been available at the Vermont Judiciary website, www.vermontjudiciary.org/envcrtdec/default.aspx. Cases before that

date are available in hard copy from the Environmental Court. A searchable index of all of the zoning decisions by the Environmental Court is available on the Burak Anderson & Melloni, PLC website, www.vtlaw1.com.

This chapter is intended as a guide to zoning law in Vermont. The text of this chapter covers the fundamentals of zoning law while the accompanying footnotes offer detailed explanation and citations to relevant cases. The results in any case often depend on the provisions of the particular zoning ordinance subject to review.

II. Planning Commission Review⁴

Generally, planning commissions, if not replaced by DRBs, perform at least two land use regulatory functions: (1) they review the creation of subdivisions (*see, e.g.*, 24 V.S.A. § 4463); and (2) they review and regulate land use and certain aspects of design, including, for example, drainage and access (*i.e.*, site plan review). 24 V.S.A. § 4416.

⁴ Zoning and subdivision bylaws change frequently. Always consult municipal planning officials to determine that you have the most recent edition of planning and subdivision bylaws. Keep this edition in your files. You may need to demonstrate compliance with zoning bylaws as they existed at the time of permitting. Many towns do not maintain complete records, making it difficult to reconstruct ordinance provisions later.

Also determine if any zoning changes are being considered or have been approved. 24 V.S.A. § 4449(d), governing the treatment of applications pending a zoning amendment change, requires the application to be reviewed under the new ordinance within 150 days of notice of a proposed change. If the municipality fails to adopt a new ordinance in that time, the one existing at time of application will be used. 24 V.S.A. § 4449(d).

Otherwise, Vermont follows a minority position requiring projects to be reviewed under bylaws as they existed at the time of application. *See, e.g., Appeal of Champlain Oil Company, Inc.*, 2004 VT 44, 176 Vt. 458, 852 A.d 622; *In re: McCormick Management Co., Inc.*, 149 Vt. 585, 547 A.2d 1319 (1988); *Smith v. Winhall Planning Commission*, 140 Vt. 178, 436 A.2d 760 (1981); *In re: Preseault*, 132 Vt. 471, 321 A.2d 65 (1974); *In re: Appeal of Taft Corners Assocs., Inc.*, Docket No. 127-7-98 Vtec (Vt. Env'tl. Ct., Dec. 28, 1998); *In re: Appeal of Roxane LaCroix, Trustee of LaCroix Family Limited Partnership Trust*, Docket No. 56-3-98 Vtec (Vt. Env'tl. Ct., Nov. 16, 1998); *In re: Appeal of South Main Street Development Limited Partnership*, Docket No. E96-085 (Vt. Env'tl. Ct., Oct. 25, 1996); *In re: Appeal of Joanne Duhl and Jim Boyland, Suzanne and Phil Kiendl, and Elizabeth and John Gould*, Docket No. E96-035 (Vt. Env'tl. Ct., July 18, 1996); *In re: Appeal of Edward Harrington*, Docket No. E96-003 (Vt. Env'tl. Ct., June 10, 1996); *In re: Application of Rene Pelissier and Brenda Sears*, Docket No. S24-95 Fc (Vt. Env'tl. Ct., Apr. 10, 1996).

A. Subdivision Review

A subdivision occurs whenever a piece of property is divided into two or more parts.⁵

ALWAYS CHECK THE DEFINITION OF “SUBDIVISION” IN A MUNICIPALITY’S ZONING BYLAWS CAREFULLY. Most, but not all, Vermont municipalities consider that a subdivision occurs only through the conveyance of a fee rather than a leasehold interest in land.⁶ Some Vermont municipalities choose not to regulate divisions that are made simply to adjust property boundaries.

Consider also whether separate lots were ever created and whether those lots have been merged. If so, new subdivision approval may be required for their separation. 24 V.S.A. § 4412(2)(B). Merger can occur any time two lots are held in common ownership.⁷ *See Wilcox*

An application for Subdivision Sketch Plan Review may be no more than a request for preliminary dialogue and categorization and is different from an application for Preliminary Subdivision Plat Review. In such case, if an application for Subdivision Sketch Plan Review is filed before a town sends notice of proposed changes in its zoning ordinance but the application for Preliminary Subdivision Plat Review is filed after the notice, the application must be considered under the proposed zoning ordinance. The applicant does not have a vested right in applying the “old” zoning ordinance when the only thing filed before the town notices an ordinance change is an application for Subdivision Sketch Plan Review. *Appeal of Highlands Development Co., LLC and JAM Golf, LLC*, Docket No. 194-10-03 Vtec (Vt. Envtl. Ct., Aug. 11, 2005).

Though a conditional use permit application was filed under 1995 zoning bylaws, an application for site plan review was not filed until 2003, and because the two are separate and distinct each with its own criteria, the site plan review application should be reviewed under the zoning bylaws in effect when that application was actually filed. *Appeal of Jolley Associates*, Docket No. 198-11-03 Vtec (Vt. Envtl. Ct., April 11, 2005).

⁵ The mere conversion of rental units to a condominium is not a subdivision for zoning purposes requiring a subdivision permit. *In re: Appeal of Lowe*, 164 Vt. 167, 666 A.2d 1178 (1995).

⁶ This contrasts with state law concerning subdivisions, which treats land leases as subdivisions.

⁷ Vermont allows lots that predate the adoption of a zoning ordinance to be developed even if the ordinance’s minimum lot size provision renders them undersized. 24 V.S.A. § 4412(2). Contiguous undersized parcels held under common ownership at the time a municipality’s minimum lot size ordinance is enacted cannot qualify as existing small lots. *In re: Appeal of Green Mountain Habitat for Humanity, In re: Appeal of Blair and Devlin*, Docket Nos. 19-1-02 and 88-4-02 Vtec (Vt. Envtl. Ct., Dec. 12, 2002).

Absent language in the Zoning Ordinance to the contrary, a parcel’s status as a pre-existing nonconforming use is not diminished, nor is merger automatically triggered, when and if the parcel is brought into common ownership with an adjoining parcel after the effective date of the ordinance. *In re: Appeal of Jenness & Berrie*, Docket No. 134-7-04 Vtec (Vt. Envtl. Ct., Oct. 24, 2005).

Because the lots did not meet the definition of contiguous pre-existing small lots, the Court did not need to consider whether or when the merger requirements of the current Zoning Ordinance ever applied to them. *In re: Appeal of Thomas and Janice Bachelder*, Docket No. 161-9-99 Vtec (Vt. Envtl. Ct., Sept. 13, 2000).

v. Village of Manchester Zoning Board of Adjustment, 159 Vt. 193, 616 A.2d 1137 (1992); *Drumheller v. Shelburne Zoning Board of Adjustment*, 155 Vt. 524, 586 A.2d 1150 (1990); *In re: Application of Fecteau*, 149 Vt. 319, 543 A.2d 693 (1988); *LeBlanc v. City of Barre*, 144 Vt. 369, 477 A.2d 970 (1984); *In re: Appeal of Lee Zachary*, Docket Nos. E96-081 and E96-110 (Vt. Env'tl. Ct., Oct. 23, 1996). Whether a lot continues to exist is determined by the municipality's bylaws, which may be more restrictive than the state enabling statute. *In re: Appeal of Baker*, Docket No. E96-097 (Vt. Env'tl. Ct., Apr. 17, 1997).

Merger may not occur if there is a physical impediment to the use of lots as a single lot. *Id.* For example, two undersized lots that have otherwise been merged because they are adjoining and share common ownership may continue as separate preexisting, nonconforming lots because a ravine separating the lots prevents the practical enjoyment of the property as a single property. *In re: Appeal of Weeks*, Docket No. E95-135 (Vt. Env'tl. Ct., Oct. 28, 1996), *aff'd on other grounds* 167 Vt. 551 (1998).

On the other hand, if a dead-end road enabled⁸ by way of an easement rather than a fee interest does not effectively prevent the two portions of a property – one on each side of the road – from being used in conjunction with one another, the parcel may be a single one for zoning purposes. *In re: Appeal of Phillips*, Docket Nos. E95-108 and E96-014 (Vt. Env'tl. Ct., Oct. 18, 1996). The function and location of a right-of-way must be examined to determine whether it effectively prevents the use of the property as a single lot.⁹ *In re Richards*, 178 Vt. 872, 872 A.2d 315 (2005).

⁸ State law concerning subdivisions treats lots separated by a road that is owned in fee by a town as separate lots. Environmental Court cases appear to operate on this assumption as well.

⁹ Common ownership of two contiguous lots does not necessarily merge them, nor does separation of two contiguous lots by a right of way necessarily make them separate lots; it must be a case-by-case determination on the

However, a nonconforming lot shall not be deemed merged and may be separately conveyed if all the following apply:

- (i) The lots are conveyed in their preexisting, nonconforming configuration.
- (ii) On the effective date of any bylaw, each lot was developed with a water supply and wastewater disposal system.
- (ii) At the time of transfer, each water supply and wastewater system is functioning in an acceptable manner.
- (iv) The deeds of conveyance create appropriate easements on both lots for replacement of one or more wastewater systems, potable water systems, or both, in case there is a failed system or failed supply as defined in 10 V.S.A. Chapter 64.

24 V.S.A. § 4412(2)(B).

Vermont statutes require municipal subdivision regulations to include:

1. Procedures and requirements for the submission and processing of plats (*i.e.*, drawings usually prepared by a surveyor delineating the lot boundaries as defined by 27 V.S.A. § 1401, *et seq.*). (See Attachment 4 for a further discussion of plats.)
2. Standards for the design of facilities that are likely to be public-*e.g.*, roads, street lights, fire hydrants, sewer, water, waste and drainage facilities, and shade trees.
3. Standards for the design and configuration of parcel boundaries and location of associated improvements necessary to implement the municipal plan and achieve the desired settlement pattern.¹⁰

facts of the particular case. Under the *Wilcox* analysis the question is not whether the lots are capable of being used separately, but whether they are incapable of being used together. *Appeal of Stewart L. Richards*, Docket No. 236-12-99 Vtec (Vt. Env'tl. Ct., Nov. 17, 2003); *see also Appeal of Jenness & Berrie*, Docket No. 134-7-04 Vtec (Vt. Env'tl. Ct., Sept. 16, 2005, July 27, 2006 and Sept. 20, 2006); *Nowicki Building Permit*, Docket Nos. 77-4-05, 156-8-05, and 220-10-05 Vtec (Vt. Env'tl. Ct., June 8, 2006).

¹⁰ In an application for subdivision of a “through” lot (an interior lot fronting on two streets) where one proposed lot has frontage on two streets, as long as the frontage on one street is adequate, the lack of sufficient frontage on the other street would be no bar to approval. *In re: Appeal of Windjammer Hospitality Group*, Docket No. 137-8-99 (Vt. Env'tl. Ct., Sept. 11, 2000).

Relocation of a roadway within a parcel by creating a separate “roadway” parcel through subdivision is permissible. Such parcel contains adequate frontage along the length of the new parcel as it is a roadway. *Appeal of Stephen Dana*, Docket No. 66-4-03 Vtec (Vt. Env'tl. Ct., Oct. 18, 2004) (emphasis added).

4. Standards for the protection of natural resources and cultural features and preservation of open space.

See 24 V.S.A. § 4418(1).

The Vermont Planning and Development Act provides that subdivision bylaws may include:

1. Provisions that allow the appropriate municipal panel to waive or modify, subject to appropriate conditions, the provision of any improvements that are not required in the interests of health, safety, or general welfare, or are inappropriate in that particular circumstance.
2. Provisions for allowing preliminary reviews prior to the submission of a subdivision plat.
3. Specific development standards to promote the conservation of energy or the utilization of renewable energy resources.
4. State standards under 10 V.S.A. § 6086(a) (i.e., Act 250).

See 24 V.S.A. § 4418(2).

Subdivision requires a hearing with public notice as specified in 24 V.S.A. § 4463(a).¹¹

If the planning commission fails to approve or disapprove a plat within 45 days, the project is deemed approved.¹² 24 V.S.A. § 4464(b)(1).

Construction of dwelling on lot will require the improvement of the lower section of the Class 4 road. Thus, any approval of the subdivision must either require the developer to commit to that improvement at that time or must clearly make it a condition of the construction on the lot and be placed in both the deed to the lot and the deed to the retained land. *In re: Appeal of Ernest Paquette*, Docket No. 127-7-97 Vtec (Vt. Envtl. Ct., Apr. 27, 1999).

Where interim regulations required frontage on public streets for subdivision and the final regulations only required frontage on a “street”, by ordinary rules of statutory construction the change is presumed to be intentional. *Appeal of Harrison*, Docket No. 199-9-02 Vtec (Vt. Envtl. Ct., Apr. 28, 2003).

¹¹ Notice requirements are discussed below. In addition to all other requirements, a copy of notice for subdivision must be sent to any adjacent municipality for subdivisions lying within 500 feet of a municipal boundary. 24 V.S.A. § 4463(a).

¹² Deemed approval is discussed below.

When rendering a decision in favor of the applicant, the planning commission, or any appropriate municipal panel, may impose conditions on any permit approval. Since 2004, there is no longer a list of permissible conditions that the appropriate municipal panel may impose.¹³

The appropriate municipal panel can condition approval on the demonstration that public improvements have been installed or can require the developer to put up a bond to cover such installation. 24 V.S.A. § 4464(b)(4). Performance bond requirements are listed in 24 V.S.A. § 4464(b)(6).¹⁴ Plats reflecting approvals must be filed within 180 days after approval. 24 V.S.A. § 4463(b).¹⁵

B. Interplay of Subdivision, Site Plan and Conditional Use Regulations

Subdivision, site plan and conditional use regulations usually involve closely related issues.¹⁶ For example, a planning commission can consider and address the safety of a street under any provision. The Environmental Court has ruled that resolution of issues in the first

¹³ The scope of permissible conditions is discussed in the site plan review section below. A condition imposed on final plat approval imposing a two-year period for posting of a performance bond has been found reasonable to ensure maintenance after construction. *Appeal of C.C. Construction and Charlie Christolini*, Docket No. 177-8-02 Vtec (Vt. Env'tl. Ct., May 6, 2003).

¹⁴ A street remains a private road until the legislative body of the municipality accepts it. 24 V.S.A. § 4463(c). Putative lot owners must make provision for access over and maintenance of the private road until it is accepted by the municipality. This is usually done by granting lot owners easements over the road in their development and either creating an association to do the maintenance or stating that it will be done in some other way with payments to be made by the lot owners.

¹⁵ If a zoning bylaw allows, a zoning officer may extend this period by 90 days "if final local or state permits or approvals are still pending." Plats are further discussed in Attachment 4. There is no provision in 24 V.S.A. § 4416 [now § 4463(b)] for correction of errors in a recorded plat. *In re: Appeal of Winchell*, Docket No. E96-189 (Vt. Env'tl. Ct., June 18, 1997). Approval expires for lots not appearing on a timely recorded plat plan. This is true regardless of the reason for omission, including ministerial or photocopying errors. To correct a failure to show a lot in plat plan, the planning commission must warn and consider the correction as a subdivision. *Id.*

Appeal tolls the recordation deadline. *In re: Appeal of Hurlburt*, Docket No. E96-072 (Vt. Env'tl. Ct., Oct. 10, 1996).

¹⁶ Utilizing the back of the restaurant for take-out service is a conditional use would also require an amendment to the site plan to consider relevant criteria such as pedestrian safety. *Appeal of LaGue, Inc.*, Docket No. 246-11-02 Vtec (Vt. Env'tl. Ct., Apr. 15, 2003).

proceeding considering them is binding in related proceedings.¹⁷ On the other hand, few projects involve subdivisions. Thus, the zoning ordinance must be structured to work independently.

C. Jurisdiction for Site Plan Review

If a planning commission exists, it usually reviews the site plan for almost every exterior change and for most changes in use proposed within a Vermont municipality¹⁸ except as follows: (1) often, one and two family houses are excepted from site plan review; (2) facilities constructed under state sanction or mandate may not be subject to review by a planning commission, *Kedroff v. Town of Springfield*, 127 Vt. 624, 256 A.2d 457 (1969); (3) public utility projects cannot be reviewed by a planning commission if the Vermont Public Service Board has legally permitted them, *City of South Burlington v. Vermont Electric Power Co.*, 133 Vt. 438, 344 A.2d 19 (1975);¹⁹ (4) small residential care facilities, small child care facilities, and group homes must be considered as single family uses, 24 V.S.A. §§ 4412(1)(G) and 4412(5); and (5) agricultural farming and silvicultural practices and uses²⁰ are exempt from municipal review. 24 V.S.A. § 4413(d). Setbacks for farm structures are set by the Commissioner of Agriculture, Food and Markets under 24 V.S.A. § 4413(d)(2). A municipality may seek to enforce such requirements, but it may not create new ones. Many municipalities exclude from site plan review such

¹⁷ Any issues regarding adequacy of traffic access and safety, other than level of service, are within the purview of site plan approval rather than conditional use approval and cannot be collaterally attacked in the present proceeding as site plan approval was not appealed. *In re: Appeal of Walter Flatow*, Docket No. 77-4-98 Vtec (Vt. Env'tl. Ct., Apr. 30, 1999).

¹⁸ Where site plan approval is requested for only certain alterations at an existing site, it is enough that the site plan show the listed features to enable the planning commission to determine whether the proposed alterations should be approved. *In re: Appeals of Victor and Sandra Gaudette, Vinton and Janice Gaudette and David Lussier*, Docket Nos. 128-8-97 and 157-9-97 Vtec (Vt. Env'tl. Ct., July 9, 1998).

¹⁹ Municipal permit boards are without authority to prohibit the extension of power within a public right-of-way. Rather, the municipal legislative body controls this issue under Title 30. *In re: Appeal of Douglas Andersen*, Docket No. E95-075 (Vt. Env'tl. Ct., Mar. 25, 1996).

²⁰ The extraction and bottling of water is not an agricultural use. *Houston v. Waitsfield*, 162 Vt. 476, 648 A.2d 864 (1994).

activities as interior alterations, exterior maintenance, repair or replacement. See, for example, *Appeal of LaGue, Inc.*, Docket No 246-11-02 Vtec (Vt. Envtl. Ct., Apr. 15, 2003), although exclusion from site plan review may be implicit.

The scope of review by a planning commission may also be limited. The following uses may be regulated only with respect to location, size, height, building bulk, yards, courts, setbacks, density, parking, traffic, noise, lighting, loading, landscaping facilities and screening, and then only to the extent the regulations do not have the effect of interfering with the intended functional use:

- (1) State- or community-owned and operated institutions and facilities.
- (2) Public and private schools and other educational institutions certified by the state department of education.
- (3) Churches and other places of worship, convents, and parish houses.
- (4) Public and private hospitals.
- (5) Regional solid waste management facilities certified under 10 V.S.A. chapter 159.
- (6) Hazardous waste management facilities for which a notice of intent to construct has been received under 10 V.S.A. § 6606a.

24 V.S.A. § 4413(a). Nor can a municipality adopt zoning regulations that prohibit or have the effect of prohibiting modular or prefabricated housing,²¹ 24 V.S.A. § 4412(1)(B), housing to meet the needs of the population determined pursuant to the Town Plan, 24 V.S.A. § 4412(1)(A), certain in-law apartments in single family residential districts, 24 V.S.A. § 4412(1)(E), or the provision of personal wireless communications services. 47 U.S.C. § 332(c)(7).²² Antennas,

²¹ Modular homes must be allowed in all districts where conventional housing is allowed. *In re: Lunde*, 166 Vt. 167, 169, 688 A.2d 1312 (1997).

²² In a mountainous area, zoning regulations that fail to allow personal wireless communications facilities on higher elevations have the effect of prohibiting the provision of those services in violation of 47 U.S.C. § 332(c)(7)(B)(II). *In re: Appeal of Bell Atlantic NYNEX Mobile, et. al.*, Docket No. E96-153 (Vt. Envtl. Ct., July 7, 1997).

solar collectors and small windmills are exempt from height restrictions unless a zoning regulation specifically provides otherwise.²³ See 24 V.S.A. § 4412(6).

Site plan approval is valid only upon compliance with notice provisions.²⁴ If a planning commission fails to act on a properly submitted site plan application within 45 days following receipt of that application, approval occurs by operation of law.²⁵

D. Site Plan Review Standards

In site plan review, planning commissions may impose “appropriate conditions and safeguards”²⁶ with respect to the adequacy of: parking,²⁷ traffic access,²⁸ and circulation for

²³ The Bethel DRB denied installation of a telecommunications tower on half an acre leased out of a 10-acre parcel. Although not an application for subdivision or site plan review, the Court reviews them under conditional use review to the extent they will adversely affect the town’s bylaws. Given the combination of tower height and small parcel size, should the tower fall over, it would land on adjacent property, causing it to fail site plan and thereby conditional use review. *Appeal of Spectrum Resources Towers, LP*, Docket No 183-8-02 Vtec (Vt. Env’tl. Ct., Dec. 10, 2003).

²⁴ 24 V.S.A. § 4444 (formerly § 4447) does not apply to planning commission meetings to consider site plan approval. *In re: Appeals of Robert W. Wimble and Carl R. Wimble*, Docket Nos. 105-6-98 and 106-6-98 Vtec (Vt. Env’tl. Ct., Mar. 1, 1999).

²⁵ The law of deemed approval is discussed below.

²⁶ Such conditions are material facts that the Court will review for reasonableness and necessity to meet the design review and site plan approval standards of the ordinance. *In re: Appeal of Thaddeus R. Lorentz and David H. Nelson*, Docket No 120-6-00 Vtec (Vt. Env’tl. Ct., Apr. 19, 2001).

In re: Appeal of Ted S. Gladstone and Kathleen Hoisington, Docket No. 190-10-99 Vtec (Vt. Env’tl. Ct., Apr. 22, 2001). Municipal authority to impose conditions on land use approval derives from the general enabling provisions contained in 24 V.S.A. Chapter 117 (2004). Specifically, a Vermont municipality is authorized, when “rendering a decision in favor of the applicant,...[to] attach additional reasonable conditions and safeguards as it deems necessary to implement the purposes of this chapter and the pertinent bylaws and the municipal plan then in effect.” *Harvey & Symmes Final Plat Application (Appeal of Bevan)*, Docket No. 96-5-05 Vtec (Vt. Env’tl. Ct., Sept. 29, 2005).

²⁷ Portion of City Charter only establishes that City has authority to regulate “parkings,” defined as area between curb and “street line,” a term not defined in submitted materials. Even if “parkings” include area on adjoining landowners’ property occupied by sidewalks, the Charter only allows the City to regulate that area, not to transfer it to City ownership. *In re: Appeal of Heilman, Ekman & Assocs., Inc.*, Docket No. 109-6-98 Vtec (Vt. Env’tl. Ct., Jan. 4, 1999).

²⁸ Because the Town has not shown a need for paving and the matter is *de novo* before the Court, the Court requires paving only of an access apron from Route 7 onto and including the driveway where it is two-way and paving of the loading zone and its adjacent driveway and apron onto the curb cut on Middle Road; the DRB must now consider whether the drainage characteristics of the gravel lot are acceptable. *In re: Appeal of Sotos Papaseraphim*, Docket No. 99-5-98 Vtec (Vt. Env’tl. Ct., Feb. 8, 1999).

Under the plain language of the ordinance, site plan approval is not required and the easement access is not required to be fifty feet in width because applicant’s lot conforms to the minimum front lot width and because it has

pedestrians and vehicles;²⁹ landscaping and screening; protecting renewable energy resources; the size, location and design of signs or exterior lighting;³⁰ and “other matters specified in the bylaws.”³¹ 24 V.S.A. § 4416. Although broad, this authority is limited at least by the following considerations:

frontage on a public road. *In re: Appeal of James MaCaulay*, Docket No. 219-11-98 Vtec (Vt. Env'tl. Ct., May 17, 1999).

Site plan for bank ATM drive-through provided maximum safety for vehicular circulation between the site and the street network because one-way entrance and exits minimized opportunities for vehicular conflict when making cars turn onto and off of the bank property. *In re: Appeal of Brown*, Docket No. E96-156 (Vt. Env'tl. Ct., June 27, 1997).

Adequate on-site circulation for bank was had because there was no evidence vehicles would cause any difficulty moving in the bank lot or that vehicles would conflict with pedestrian use of the site. *Id.*

Proposed design changes denied because of increases they would cause in two-way traffic between the lots and conflicts between traffic entering from the two different lots that would lead to a decrease in safety. This decrease in safety was not outweighed by safety improvements that would result from safety improvements that could be made through proper management of the existing lots. *In re: Appeal of Brigham and Ryan*, Docket No. E95-069 (Vt. Env'tl. Ct., June 10, 1996).

The zoning regulation requires a maximum of one driveway (curb cut) per lot, unless specifically approved by the planning commission or the Court. Dual driveways are treated as a single driveway for purposes of the regulation. As the project is on a corner lot at a busy intersection on a major arterial street, the Court finds that two driveways are safer and will minimize problems with traffic flow on adjacent roadways, compared to one dual driveway on either one of the adjacent streets. *Id.*

Court finds the need for the pedestrian island and the design to prevent left turns across the three lanes of Williston Road to be special circumstances allowing for a different size than the 36-foot maximum width required for driveways. *Id.*

²⁹ A gravel sidewalk is a reasonable requirement to carry out town policy to provide sidewalks for improved pedestrian circulation along Route 7. *In re: Appeal of Sotos Papaseraphim*, Docket No. 99-5-98 Vtec (Vt. Env'tl. Ct., Feb. 8, 1999).

³⁰ The color scheme employed on the canopy edge and building roof edge does not fall within the definition of a sign. That is, the paint scheme itself, without more, is not a design, picture, symbol, or trademark. As with any paint scheme or other façade decoration, it may be regulated under the standards for site plan approval or conditional use approval, but not as constituting a portion of the sign area. *In re: Appeal of Cumberland Farms, Inc.*, Docket No. 59-4-98 Vtec (Vt. Env'tl. Ct., Dec. 15, 2000).

³¹ Because the lot has not been subdivided, the lot coverage proposed by the new construction must be calculated by adding it to the existing lot coverage to determine the lot coverage for the entire lot. Only after that calculation has been made does the Court turn to the method of determining acceptable lot coverage under the regulations because the lot is split into two zoning districts with different lot coverage requirements. Although the buildings are concentrated toward the front portion of the lot, nothing in the calculation methodology provided by the code prevents the entire lot from being considered in the calculations. Thus, applicants are entitled, from a lot coverage point of view, to propose new construction on the lot that would bring the overall lot coverage up to at least 40%. *In re: Appeal of Ettore and Rosemary Mancuso*, Docket No. 20-2-97 Vtec (Vt. Env'tl. Ct., July 9, 1998).

Because the lot has not been subdivided along the zoning district line or elsewhere, applicants need not meet the setback requirements along the zoning district line. *In re: Appeal of Ettore and Rosemary Mancuso*, Docket No. 20-2-97 Vtec (Vt. Env'tl. Ct., July 9, 1998).

1. Such conditions must be in proportion to the impact of the development. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987).
2. Conditions can only address issues regulated or prohibited by local zoning.³²
3. Review boards cannot use conditions to delegate their authority through conditions.³³
4. Conditions must be supported by sufficient evidence.³⁴

Nothing in setback requirements of an ordinance exempts a lot on a right-of-way from the setback requirements applicable to a lot on a road. Setback is measured from the centerline of the traveled way to the closest point on the building. *In re: Appeal of William Eberle*, Docket No. E96-078 Vtec (Vt. Env'tl. Ct., July 16, 1996).

In a built-up area with many existing uses that are nonconforming as to setbacks, the town is free to provide a mechanism for approving different setbacks as conditional uses when certain criteria are met, so long as those criteria or standards are laid out in the zoning bylaw. *In re: Appeals of John Hibshman*, Docket Nos. 92-5-98 and 172-9-98 Vtec (Vt. Env'tl. Ct., Jan. 4, 1999).

Amended site plan modifying dumpster enclosure and orientation is an improvement to the site allowing the truck to better maneuver and access the dumpster for emptying. The screening of the dumpster which is only on two sides should be adjusted to block views of neighbors. However, due to the difficulty of cleaning out the pen in the winter, the fence may be hinged or removable and stored elsewhere in the winter. *Appeal of Third Millennium, Inc. and Rita Rizza*, Docket No. 195-9-02 Vtec (Vt. Env'tl. Ct., May 12, 2003).

Court cannot approve a site plan that fails to show drainage lines as required by zoning bylaw and cannot approve a site plan without a safeguard to the future installation of septic systems on the subdivided lots, to enable future owners to comply with zoning bylaws. *In re: Appeal of Herbert P. and Isabelle M. Petersen*, Docket No. E97-024 (Vt. Env'tl. Ct., Dec. 15, 1997).

³² The Court cannot restrict uses affecting wetlands unless the zoning bylaws address such issues. *In re: Appeal of Munger*, Docket No. E95-053 Vtec (Vt. Env'tl. Ct., Aug. 28, 1995).

Conditions not supported by zoning regulations are illegal and may be invalidated at any time. *In re: Application of Rene Pelissier and Brenda Sears*, Docket No. S 24-95 Fc (Franklin Sup. Ct., Apr. 10, 1996).

In an appeal of a conditional use approval for a two-unit duplex on a street that is already too narrow and congested for the number of homes on it, it is not within the jurisdiction of the Court to require a condition that contracts for fuel and garbage disposal services for a new building be placed with the companies that otherwise serve properties on that same street, even if it is to minimize additional service vehicle traffic. *Appeal of Coon, et al.*, Docket No. 166-9-04 Vtec (Vt. Env'tl. Ct., Aug. 22, 2005).

³³ Where a town ordinance regulates sewer installation, it is not sufficient merely to require that the sewage systems obtain future approval from the State. A town review board cannot delegate its responsibilities under its subdivision regulations to future action by State regulators. *In re: Appeal of Ernest Paquette*, Docket No. 127-7-97 (Vt. Env'tl. Ct., Apr. 27, 1999).

Portion of condition in permit, requiring that the revised location of the transformer shall be approved by the City Planner exceeds the authority of the planning commission. Condition could require that any future revision to the location of the transformer shall be shown on an amended plot plan to be filed with the planning commission. *Id.*

³⁴ The ZBA, and therefore the Court, cannot approve of conditions intended to mitigate adverse impacts on parking without an adequate engineering explanation of proposed traffic patterns. *Appeal of Douglas Spates and Vivian Spates*, Docket No. 127-6-02 Vtec (Vt. Env'tl. Ct., Jan. 6, 2003).

5. Conditions cannot be imposed on land of non-applicants. A review board is without jurisdiction to impose conditions on lands of non-applicant landowners.³⁵

Enforceable conditions are those expressly included in the permit. They do not include representations made at the hearing. *In re: Appeal of Joseph and Joan Long*, Docket No. E95-027 (Vt. Env'tl. Ct., Mar. 1, 1996); *see also In re: Appeals of Ernest and Janet Marcelino*, Docket Nos. 181-11-97 and 122-7-99 Vtec (Vt. Env'tl. Ct., July 19, 2000); *In re: Appeal of Freeman, et al.*, Docket No. 163-10-96 Vtec (Vt. Env'tl. Ct., Oct. 6, 1998). Conditions include the mandatory provisions of an ordinance whether such provisions are included as conditions or not. *In re: Stowe Club Highlands*, 164 Vt. 272, 668 A.2d 1271 (1995); *In re: Kostenblatt*, 161 Vt. 292, 640 A.2d 39 (1993). Expressed conditions cannot be changed by "customs" of planning officials.³⁶

Unless reflected in the conditions, no matter what promises may have been made in side negotiations, the litigants are left to their equitable remedies to enforce any agreements arising out of such side negotiations. *In re: Appeal of Richard and Karen Babcock*, Docket No. 66-5-97 Vtec (Vt. Env'tl. Ct., July 13 and Oct. 5, 1998). If any activities, such as noise and behavior are

Final plat approval is conditioned on the elimination of structures for which engineering data is insufficient to judge their impact. *Appeals of Garen*, Docket Nos. 42-3-01 and 218-9-00 Vtec (Vt. Env'tl. Ct., Aug. 1, 2003).

³⁵ It is beyond the Zoning Board's authority in ruling on a permit for one landowner's property to impose conditions on the property of a landowner that is not a party to the application. Thus, a condition may not require power lines to a property to be buried. Instead, a condition may be imposed restricting construction using power on the property. *In re: Cross Appeals of American Legion J. Claire Carmody Post #39 and Linda Leach*, Docket No. E95-059 (Vt. Env'tl. Ct., Jan. 22, 1996).

Subdivision regulations cannot impose a requirement for street maintenance on neighboring landowners who are not part of the subdivision. *In Re: Appeal of Ernest Paquette*, Docket No. 127-7-97 Vtec (Vt. Env'tl. Ct., Apr. 27, 1999).

Court cannot impose condition requiring the upgrading of private roads within the subdivision even if paid for entirely by applicants because roadways are the responsibility of the homeowner association, which is not a party before the Court. *In re: Appeal of Alan Guttmacher, Brigid Guttmacher, Bruce Wheeler, Roger Dunn and Suzanne Richard*, Docket Nos. E96-161 and E96-188 (Vt. Env'tl. Ct., Aug. 20, 1997).

³⁶ Appellant's Motion for Summary Judgment granted in part because the permit and site plan permitted the freestanding sign to be placed 15 feet from the "property line" on the Union Street side. This requirement of the permit cannot be varied by any evidence that might show that the custom of the planning department is to measure

to be limited, they must be limited by a condition of the permit and not by a private undertaking such as a club's bylaws. *In re: Appeal of Vincent and June Sardi, et al.*, Docket Nos. 148-9-97 and 155-9-97 Vtec (Vt. Env'tl. Ct., July 16, 1998).

Unlike the statutory requirements that a ZBA's decision must reflect its findings, there is no statutory requirement that a Planning Commission must produce findings or conclusions when conducting site plan review. On appeal the Environmental Court can only consider matters originally considered by the Planning Commission. *Simendinger v. City of Barre*, 171 Vt. 648, 770 A.2d 888 (2001); *In re Appeal of James Holmes*, Docket No. 134-6-00 Vtec (Vt. Env'tl. Ct., Mar. 26, 2001).³⁷

E. Generally Applicable Provisions

The following required provisions apply in every municipality:

- (1) Existing small lots. A municipality may prohibit development of a lot if either of the following applies:
 - (a) the lot is less than one-eighth acre in area; or
 - (b) the lot has a width or depth dimension of less than 40 feet.

24 V.S.A. § 4412(2)(A)³⁸

front setbacks from the inside edge of the sidewalk if that requirement was not stated in the permit. *In re: Appeal of Heilmann, Ekman & Assocs., Inc.*, Docket No. 109-6-98 Vtec (Vt. Env'tl. Ct., Jan. 4, 1999).

³⁷ This decision appears to override an earlier line of Environmental Court cases holding that the Environmental Court could consider issues presented to the Planning Commission regardless of whether the Planning Commission actually addressed the issue in its decision. *In re: Appeal of Robert Waite and Diane Welebit*, Docket Nos. 139-6-00 and 183-8-00 Vtec (Vt. Env'tl. Ct., Apr. 26, 2001) (citing *In re: Maple Tree Place*, 156 Vt. 494, 500 (1991)); *See also In re: Appeal of Concerned Citizens of West Shore Road*, Docket No. 205-11-99 Vtec (Vt. Env'tl. Ct., May 22, 2000).

³⁸ This provision may or may not allow an existing use to be expanded. As the Environmental Court discussed in *In re: Persi Corporation*, Docket No. 100-6-98 Vtec (Vt. Env'tl. Ct., July 28, 1999), the "existing small lot" provisions only guarantee that an undersized lot may be developed at all for a reasonable economic use. Those provisions do not guarantee indefinite expansion of uses on undersized lots. *In re: Appeal of Richard and Betty Harrison*, Docket No. 48-3-99 Vtec (Vt. Env'tl. Ct., Feb. 28, 2000).

Even if a lot qualifies for the "existing small lot" exemption, that provision only exempts the lot from the minimum size requirements, not from all of the other requirements of the zoning ordinance. *In re: Appeal of Gerald and Elaine Laferriere*, Docket No. 223-12-98 Vtec (Vt. Env'tl. Ct., July 6, 2000).

(2) Required frontage on, or access to, public roads or public waters. Land development may be permitted on lots that do not have frontage either on a public road or public waters, provided that access through a permanent easement or right-of-way has been approved in accordance with standards and process specified in the bylaws. This approval shall be pursuant to subdivision bylaws adopted in accordance with section 4418 of this title, or where subdivision bylaws have not been adopted or do not apply, through a process and pursuant to standards defined in bylaws adopted for the purpose of assuring safe and adequate access. Any permanent easement or right-of-way providing access to such a road or waters shall be at least 20 feet in width.

24 V.S.A. § 4412(3).³⁹

(3) Protection of home occupations. No bylaw may infringe upon the right of any resident to use a minor portion of a dwelling unit for an occupation that is customary in residential areas and that does not have an undue adverse effect upon the character of the residential area in which the dwelling is located.

24 V.S.A. § 4412(4).⁴⁰

Land devoted to a roadway may not be used in calculating the dimensions of a lot for application of this provision. *In re Bailey*, 178 Vt. 614, 883 A.2d 765 (2005). This case overrules previous rulings by the Environmental Court to the effect that if land underlying the road right-of-way is owned by appellee-applicants, with an easement for the right-of-way deeded to the State, then that area is included in the lot area calculation for purposes of former 24 V.S.A. § 4406 (now § 4412(2)). *In re: Appeal of John Binks, Kathleen Binks, and Ruth Gjessing*, Docket No. 91-5-98 Vtec (Vt. Env'tl. Ct., Mar. 4, 1999).

Land lying between the mean high water mark and the mean low water mark is included in the lot for the purposes of calculating lot area. *Id.*

The Town's zoning regulation entirely governs and preserves the conditions of permits and contracts issued, or entered into under prior law, and by its terms applies to "existing building lots of record." Purchasers of lots in the permitted development were entitled to rely on the permit conditions allowing development of the lot for a single-family residence. *In re: Appeal of B. James Bodenstein and Kathleen Bodenstein*, Docket No. 146-9-97 Vtec (Vt. Env'tl. Ct., June 25, 1998).

³⁹ Where zoning bylaws require frontage on a public road or public waters, frontage on a stream too small to qualify as a navigable public water under 10 V.S.A. § 1422 is insufficient. *Appeal of Linda Boisvert and High McGee*, Docket No. 193-8-02 Vtec (Vt. Env'tl. Ct., May 5, 2003).

⁴⁰ The care of the puppies, the paperwork and customer visits associated with the sale of the puppies is conducted in a minor portion of the dwelling and is subordinate to the use of the dwelling as a residence. It does not affect the character of the building as a residence or the character of the neighborhood. There is no exterior storage of materials or excessive noise or odors. Thus, the care of the puppies and the paperwork and customer visits associated with the sale of the puppies qualify as a home occupation. *In re: Appeals of Katherine Proctor and Grace Cehura*, Docket Nos. 159-10-96 and 121-7-97 Vtec (Vt. Env'tl. Ct., May 8, 1998).

The Court distinguishes the permitted customary home occupation use from the other use categories. When a resident maintains a separate office or studio within the residence or accessory building he or she should apply for use approval. Producing art, displaying and selling it to retail customers falls squarely within the professional business office or studio use category. *Appeal of Morrow*, Docket No. 92-6-03 Vtec (Vt. Env'tl. Ct., Oct. 20, 2003). See also *Thomas Tafuto and Kathleen Tarrant-Tafuto v. Frederick Viens, II, Town of Fayston, and Kevin Russell, Zoning Administrator*, Docket No. 180-10-03 Vtec (Vt. Env'tl. Ct., Dec. 16, 2003), and *In re: Appeal of Nott*, Docket No. 141-6-00 Vtec (Vt. Env'tl. Ct., Aug. 9, 2001).

(4) Child Care. A home or facility where the owner or operator is licensed or registered by the state for child care. A family child care home serving six or fewer children shall be considered to constitute a permitted a single-family residential use not requiring site plan approval. A family child care home serving no more than six full-time children and four part-time children is a permitted use but may require site plan approval.⁴¹ Larger day care facilities are subject to all applicable zoning bylaws.

24 V.S.A. § 4412(5).

(5) Nonconformities. Bylaws must define how nonconformities are addressed including standards for non-conforming uses, nonconforming structures, and non-conforming lots.

24 V.S.A. § 4412(7).

F. Permissible Regulations

Municipalities can “adopt zoning regulations that may include, but shall not be limited to, any of the following provisions.”⁴² See 24 V.S.A. § 4414.

1. Zoning Districts. A zoning ordinance lists uses in each zone that are permitted as of right or conditional requiring review and approval. Other uses are not permitted.⁴³ The enabling statute lists some of the permitted types of zoning districts including:

(A)(i) Downtown, village center, and new town center districts. A municipality should conform the purpose statement to 24 V.S.A. § 2791, and in creating

Under zoning ordinance, all aspects of home occupation are required to be carried on within residence or accessory structure. Proposal to keep two cars awaiting repairs outside at any given time is not in conformance with ordinance. *In re: Appeal of Thomas May*, Docket No. 79-5-97 Vtec (Vt. Envtl. Ct., June 7, 1999).

⁴¹ Where the Zoning Ordinance provides three categories for home daycare facilities and one allowing more than 6 full time and 4 part time children provides the facility “may,” at the discretion of the municipality, be subject to all applicable municipal zoning bylaws, the lack of specific regulation addressing the category is not a case where the municipality has not exercised its discretion thereby barring enforcement of zoning requirements; instead it allows the municipality to apply zoning requirements as it deems necessary. *In re: Appeal of Russell Collins, Therese Collins, Gary Collins, and Ammie Collins*, Docket No 267-11-00 Vtec (Vt. Envtl. Ct., Dec. 7, 2001).

⁴² When the provisions are not mandatory, the state enabling statute does not provide authority for a town to act on site plan approval for any category of uses unless site plan approval is required for that category in the town’s own zoning regulations. The town must exercise this grant of authority in its zoning regulations for the requirement to apply to any category of uses or any zoning district within the town. *In re: Appeal of LiCausi, et al, In re: Appeal of John A. Russell Corp. and Crushed Rock, Inc.*, Docket Nos. 203-11-98, 77-5-99 and 230-11-99 Vtec (Vt. Envtl. Ct., Jan. 5, 2000).

⁴³ Because “light industrial” and “extraction of earth resources” are listed uses and are at least as industrial in nature as the proposed sawmill and because the language of the zoning bylaw allows consideration of “other similar uses,” the court must examine the similarity or lack thereof of the proposed use to all of the listed uses. *In re: Appeal of Daniel Davis*, Docket No. 83-5-98 Vtec (Vt. Envtl. Ct., Jan. 5, 1999).

the district should incorporate into their requirements and standards the eight criteria listed in 24 V.S.A. § 4414(1)(A)(i)-(viii).

- (B)(i) Agricultural and rural residential districts, permitting all types of agricultural uses and prohibiting all other land development except for residential lots of not less than twenty-five acres each;
- (B)(ii) Forest districts, permitting commercial forestry and related uses, and prohibiting all other land development;
- (B)(iii) Recreational districts, permitting camps, ski areas, and related recreational facilities, including lodging for transients and seasonal residents, and prohibiting all other land development except construction of residences for occupancy by caretakers and their families.
- (C) Airport hazard area. Municipalities can regulate use, location, size of buildings and density within two miles of an approach zone and within one mile of the boundaries of the airport elsewhere, in accordance with 5 V.S.A. Chapter 17.
- (D) A municipality may regulate shorelands, including protecting and preserving wetlands, regulating design and maintenance of sanitary facilities, and controlling the placement of fill or other alterations to wetlands.
- (E) Design Review Districts. Design review districts permit a planning commission to review a design against any enumerated design standards. However, a design review district can be created for any area containing structures of historical, architectural or cultural merit, and other areas in which there is a concentration of community interest and participation such as a central business district, civic center, or a similar grouping or focus of activities. These areas may include townscape areas that resemble in important aspects the earliest permanent settlements, including a concentrated urban settlement with striking vistas, views extending across open fields and up to the forest edge, a central focal point and town green, and buildings of high architectural quality, including styles of the early nineteenth century. Within such a designated design review district, no structure may be erected, reconstructed, substantially altered, restored, moved, demolished, or changed in use or type of

occupancy without approval of the plans by the appropriate municipal panel.⁴⁴

Prior to the establishment of such a district, the planning commission must prepare a report describing the particular planning and design problems of the proposed district and setting forth a design plan for the areas which shall include recommended planning and design criteria to guide future development. The planning commission must hold a public hearing, after public notice, on that report. After such hearing, the planning commission may recommend to the legislative body a design review district.

A design review board may be appointed by the legislative body of the municipality to advise the appropriate municipal panel, which board shall have such term of office, and such procedural rules, as the legislative body determines.

(F) Historic Districts and Landmarks Zoning Districts. These are simply a form of design control district specially tailored to historic preservation.⁴⁵ The planning commission must produce a map identifying the boundaries of the district, a justification of the boundary, and a description of the importance of the significance of the landmark[s] or district. The planning commission must consider the following in reviewing plans involving historic districts:

(I) the historic or architectural significance of the structure, its distinctive characteristics, and its relationship to the historic significance of the surrounding area;

(II) the relationship of the proposed changes in the exterior architectural features of the structure to the remainder of the structure and to the surrounding area;

⁴⁴ Vinyl siding can be installed on the side and back of a building, but the front must be restored consistent with historic preservation design guidelines. *In re: Appeal of Bove*, Docket No. E95-119 (Vt. Env'tl. Ct., Aug. 30, 1996).

Despite the fact that surrounding buildings have substitute siding, use of aluminum siding on applicant's building would have an incremental negative effect on the integrity of the Historic District in which it is located and would not relate harmoniously with the other contributing structures in the vicinity that have a visual relationship with the applicant's building. *In re: Appeal of Harrington*, Docket No. E96-003 (Vt. Env'tl. Ct., June 10, 1996); *In re: Appeal of Thomas A. McHugh*, Docket No. 50-4-97 Vtec (Vt. Env'tl. Ct., July 13, 1998); *In re: Appeal of Realco Investment Group*, Docket No. 224-12-96 Vtec (Vt. Env'tl. Ct., July 13, 1998).

Use of aluminum siding would disrupt the historic and traditional features of the historic building and neighborhood pattern of the historical district. The Court is directed to minimize such disruption as is practical and denial of applicant's application will do this. *In re: Appeal of Thomas A. McHugh*, Docket No. 50-4-97 Vtec (Vt. Env'tl. Ct., July 13, 1998).

⁴⁵ Historic preservation federal and state income tax credits are discussed in Attachment 5 hereto.

(III) the general compatibility of the proposed exterior design, arrangement, texture, and materials proposed to be used; and,

(IV) any other factors, including the environmental setting and aesthetic factors which the commission or the board deems to be pertinent.

In reviewing applications relating to historical districts, the following apply:

(I) the commission or the board shall be strict in its judgment of plans for those structures deemed to be historically valuable under 24 V.S.A. § 4414(1)(F)(i). A commission or a board is not required to limit new construction, alteration, or repairs to the architectural style of any one period, but may encourage compatible new design;

(II) if an application is submitted for the alteration of the exterior appearance of a structure or for the moving or demolition of a structure deemed to be historically significant under 24 V.S.A. § 4414(1)(F)(i), the commission or the board shall meet with the owner of the structure to devise an economically feasible plan for the preservation of the structure;

(III) an application shall be approved only when the commission or the board is satisfied that the proposed plan will not materially impair the historic or architectural significance of the structure or surrounding area;

(IV) in the case of a structure deemed to be significant under 24 V.S.A. § 4414(1)(F)(i), the commission or the board may approve the proposed alteration despite 24 V.S.A. § 4414(1)(F)(ii)(III) if:

(aa) the structure is a deterrent to a major improvement program which will be of clear and substantial benefit to the municipality; or

(bb) retention of the structure would cause undue financial hardship to the owner.

2. Overlay districts. These are special districts that allow a municipality to supplement or modify the zoning requirements in the underlying district to

provide supplementary provisions for shorelands and floodplains, aquifer and source protection, ridgelines and scenic features, and highway intersections.⁴⁶

3. Conditional Use. Conditional uses, which are permitted if certain conditions are satisfied, are discussed below.⁴⁷
4. Parking. Municipality can regulate standards for off-street parking and requirements for parking, including location, size, design, access, landscaping and screening of parking facilities.
5. Performance Standards. A zoning bylaw can permit certain uses as long as its impact falls below certain standards, for example, for noise, vibration, smoke, dust, odor, or other form of air pollution, heat, cold, dampness, electromagnetic or other disturbance, glare, liquid or solid refuse or waste; or create any dangerous, injurious, noxious, fire, explosive, or other hazard. (Performance Standards are seldom used in practice because they are expensive to apply and enforce, and they reduce certainty for developers.)⁴⁸
6. Access to renewable energy resources. A municipality may adopt bylaws to encourage conservation, however any such bylaws must establish a standard of review for conformance with the municipal plan.
7. Inclusionary zoning. Allows municipalities to enact bylaws that a percentage of housing units in a proposed subdivision or planned unit development meet the

⁴⁶ Because the lot is pre-existing under the zoning regulations, the planning commission, and hence the Court, may approve peak hour traffic volumes above the normal standards if the proposed use will not increase the peak hour traffic volumes above that currently generated by the existing use or if other site improvements will produce a net benefit for traffic in the vicinity. *In re: Appeal of Spear Street/East Terrace Neighborhood Assn. (SETNA)*, Docket No. E96-045; *In re: Appeal of SETNA*, Docket No. E96-107, *In re: Appeal of Timberlake Assocs.*, Docket No. E96-169 (Vt. Envtl. Ct., Jan. 28, 1998).

⁴⁷ If a use category is designated as a “conditional use” category in a specific district, that designation merely entitles the applicants to apply for approval of a specific proposal within that use category. *In re: Appeal of Goldschmid*, Docket No. 91-6-01Vtec (Vt. Envtl. Ct., Dec. 27, 2002).

⁴⁸ Site plan approval denied without prejudice because applicant failed to submit testing or engineering results to prove that proposal to use property for septic and sewer service business would meet performance standards, including specifically standards on odor, noise at property line, smoke and not creating an unsafe or unhealthy condition. *In re: Appeal of P&H Senesac, Inc.*, Docket No. 198-12-97 Vtec (Vt. Envtl. Ct., July 9, 1998).

Site plan approval denied without prejudice to applicants resubmitting an application to the planning commission without substantial change, but with the testing or engineering results to prove that the proposal will meet the performance standards, including specifically the standards on noise at the property line. *In re: Appeals of Victor and Sandra Gaudette, Vinton and Janice Gaudette, and David Lussier*, Docket Nos. 128-8-97 and 157-9-97 Vtec (Vt. Envtl. Ct., July 9, 1998).

If access chamber covers are replaced with solid covers in the parking lot to prevent surface water contaminant runoff into the drainage pipe and thereby into the river, the roof drainage system cannot reasonably be expected to impact significantly any of the performance standards in the zoning ordinance. *In re: Appeals of Vanderbilt MPD Corp.*, Docket Nos. 110-6-98, 115-6-98, 177-10-98 and 178-10-98 Vtec (Vt. Envtl. Ct., Jan. 29, 1999).

criteria for affordable housing, provided that affordable housing is needed. Affordable housing bylaws should conform to the housing element of the municipal plan, include development incentives and provide for the continued affordability of the housing.

8. Waivers. Municipalities may grant waivers to reduce dimensional requirements, but the bylaws must specify how the waivers are granted and how they can be appealed.⁴⁹
9. Stormwater management and control. Municipalities may also enact bylaws governing stormwater management and control, time share projects, archaeological resources, and wireless telecommunications facilities. 24 V.S.A. § 4414(9)-(12).
10. Transfer of development rights. “TDRs” resemble planned unit developments except density is traded from one site to another. It is a very complex system and, for this reason, is seldom used. Rather, the same goals can be addressed using an impact fee - *i.e.* charge developers for developing in certain areas and use the money to purchase development rights in others. 24 V.S.A. § 4423.
11. Shorelands. A municipality may regulate shorelands and flood hazard areas. 24 V.S.A. §§ 4414(1)(D), 4424.
12. Planned residential developments and planned unit developments. These are zoning tools that permit development conditions to be relaxed as long as the overall objectives of zoning are satisfied. For example, frontage and setback requirements may be reduced or eliminated as long as the density requirements (residential unit per acre) remain the same. This type of zoning permits developers to deal with Vermont’s topography and environmental restrictions and to reduce the overall cost of development. For example, clustering units in a portion of a lot while maintaining the normal density permits farmland to be saved and reduces the cost of development. Additionally, pipes and roads need not be built all over the acreage being developed.⁵⁰

24 V.S.A. § 4417.

⁴⁹ This provision appears to reverse the holding in *In re Jackson*, 175 Vt. 304, 830 A.2d 685 (2003), requiring all waiver provisions to be analyzed as conditional uses.

⁵⁰ Because it is the planning commission that must approve a master plan for a planned development in the first place and because the Quechee Lakes Master Plan provides a process for its amendment, it is within the authority of the planning commission to act on an application to amend the Master Plan to add a use not previously included as a potentially approvable use in the village area. *In re: Appeal of Taryn Wilson and Jack McGowan*, Docket No. 111-7-97 Vtec (Vt. Envtl. Ct., May 6, 1998).

III. Board of Adjustment Review⁵¹

A. General Jurisdiction

Vermont Zoning Boards of Adjustment exercise jurisdiction in three principal areas:

1. They consider requests for conditional use approval. 24 V.S.A. § 4414(3).
2. They may review and determine appeals from decisions of the zoning administrative officer (zoning administrator). 24 V.S.A. § 4465(c)(1);⁵² and
3. They consider and decide requests for variances from the requirements of the zoning regulations. 24 V.S.A. §§ 4465(c)(2), 4469.

Conditional use review is an original jurisdiction function. The last two responsibilities can be classified as appellate functions. Although a zoning board previously could issue stays as an appellate body, stays are now automatic until the municipal review board issues a decision. If the decision of the zoning board is appealed to the Environmental Court, the stay continues automatically for 15 days after the Court receives the appeal, then is either continued by the Court or the stay lapses. Decisions by the zoning board on appeal must be made within 45 days following the last hearing, or the application is approved by operation of law (also known as deemed approval). 24 V.S.A. § 4464(b)(1).⁵³

⁵¹ Portions of this section are based on materials originally prepared by Richard Spokes, Esq.

⁵² Court has no jurisdiction to invalidate zoning permit issued by zoning administrator because no party has appealed to Court from any action by ZBA on an appeal of the permit. *In re: Appeal of Barbara Wright, et al.*, Docket No. 35-2-98 Vtec (Vt. Env'tl. Ct., Dec. 18, 1998).

⁵³ Deemed approval is discussed further below.

B. Hearings and Evidence

In exercising each of its three major powers, the ZBA must conduct a public hearing with public notice before rendering a decision.⁵⁴ The public hearing requirement includes the following due process rights (*see* 24 V.S.A. §§ 4464(b)(1) and 4468):⁵⁵

- The right to present evidence through witnesses and/or exhibits.
- The right to cross-examine witnesses.
- The right to have testimony under oath.
- The right to be represented by an agent or counsel.
- The right to a written decision with supporting reasons.⁵⁶

A ZBA is not required to adhere to the Vermont Rules of Evidence, but it is required to follow the rules of evidence applicable to contested cases before administrative agencies. 3 V.S.A. § 810. Generally, hearings are informal. *In re: Appeal of Janet C. Dunn, et al.*, Docket No. 2-1-98 Vtec (Vt. Env'tl. Ct., Mar. 8, 1999). Lawyers should offer low-key presentations and avoid “over lawyering.” On the other hand, in response to contested and controversial applications, a ZBA hearing occasionally involves several lawyers and strict adherence to the evidentiary rules set forth in the Vermont Administrative Procedure Act. *Id.*

⁵⁴ Policy considerations may best be balanced to allow a ZBA to reopen a decision under the following conditions: (1) prior to expiration of time for appeal of original decision, ZBA must vote to reopen and must provide interested parties and public with proper notice of hearing to be held on reopened decision; and (2) ZBA must allow all interested parties to present any additional evidence and argument at the hearing on the reopened decision. With these conditions, there is no prejudice either to parties favoring the original decision, nor to parties intending to appeal the original decision. *In re: Appeal of Janet C. Dunn, et al.*, Docket No. 2-1-98 Vtec (Vt. Env'tl. Ct., Mar. 8, 1999).

⁵⁵ ZBA meetings properly warned where warning specifically advised that earlier hearing recessed due to applicant's modification of original proposal and specifically described project. *In re: Appeals of Robert W. Wimble and Carl R. Wimble*, Docket Nos. 105-6-98 and 106-6-98 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999).

Husband of ZBA member attended hearing as interested party. His participation as an interested party presents the type of conflict of interest that should have resulted in his spouse's recusal from the proceedings on the application. Her participation in the hearing and discussion could have influenced the votes of the other board members. The only mechanism available to cure the problem is to remand consideration of the application and its discussion and decision to a board without the spouse member. *In re: Appeal of Gardner Stone*, Docket No. 193-12-97 Vtec (Vt. Env'tl. Ct., June 24, 1998).

⁵⁶ Summary judgment granted where ZBA decision failed to set forth the findings of fact and reasons for decision. *In re: Appeal of Phillip Mayo*, Docket No. 149-8-98 Vtec (Vt. Env'tl. Ct., Feb. 24, 1999).

ZBA decisions must be based upon the evidence presented at the hearing.⁵⁷ A ZBA may conduct a site visit, and it may consider its observations in decisionmaking. Act 250 precedent requires a District Environmental Commission to place its observations on the record and to give the parties a chance to offer rebuttal evidence. *In re: Quechee Lakes Corporation*, 154 Vt. 543, 580 A.2d 957 (1990). Though not explicitly required, it is good practice for the ZBA to follow this precedent.⁵⁸

C. Conditional Use

Conditional uses are permitted if certain conditions are satisfied.⁵⁹ The conditions are (i) general and mandatory; and (ii) specific and permissive. The general and mandatory conditions

⁵⁷ ZBA should not have considered or made findings on any aspect of the merits of the application for a variance because appellants did not present an application for a variance to the ZBA. *In re: Appeal of William H. Baade, Helen M. Baade, Hans Wicken and Oriba, Inc., d/b/a Potlatch Tavern, Appellants*, Docket No. 31-2-98 Vtec (Vt. Env'tl. Ct., Sept. 21, 1998).

⁵⁸ For a more detailed review of site visits in an on-the-record ZBA hearing, see *Appeal of Tepper*, Docket No. 225-12-04 Vtec (Vt. Env'tl. Ct., Feb. 8, 2006).

⁵⁹ Statutory factors must be applied as a minimum standard even if the zoning regulations fail to adopt them verbatim. The test is that the proposed use shall not adversely affect any of the statutory or regulatory criteria. *In re: Appeal of Spear Street/East Terrace Neighborhood Assn. (SETNA)*, Docket No. E96-045, *In re: Appeal of SETNA*, Docket No. E96-107, *In re: Appeal of Timberlake Assocs.*, Docket No. E96-169 (Vt. Env'tl. Ct., Jan. 28, 1998).

The approval of one particular conditional use in one location within a district does not create a precedent for the approval of another conditional use in that district; rather, each conditional use must be analyzed independently according to the standards in the Zoning Ordinance and according to whether any appropriate conditions can achieve compliance with those standards. *In re: Appeal of Edward and Phyllis Lashins*, Docket No. 192-10-03 Vtec (Vt. Env'tl. Ct., June 27, 2005).

A nonprofit club must obtain conditional use approval if it wishes to undertake activities listed as conditional uses, and it may not undertake activities that are not listed in the ordinance as permitted or conditional uses in the zoning district in which it is located, any more than an individual or a corporation could do so. *In re: Appeal of Thomas and Carol Spencer*, Docket No. 24-2-98 Vtec (Vt. Env'tl. Ct., May 17, 1999).

When an applicant receives conditional use approval, with conditions, to convert a 2-unit dwelling to a 3-unit dwelling, the conversion cannot happen until the conditions are met. *Town of Charlotte v. Carol Aube-Hinsdale & Appeal of Carol Aube-Hinsdale*, Docket Nos. 77-4-00 and 182-8-02 Vtec (Vt. Env'tl. Ct., Dec. 5, 2002).

When an applicant receives a conditional use permit with conditions and its final site plans are approved and recorded, those site plans become permit conditions. *Appeal of 232511 Investments Ltd. d/b/a Stowe Highlands*, Docket No. 67-4-04 Vtec (Vt. Env'tl. Ct., Apr. 26, 2005), *aff'd* 2006 VT 27, 179 Vt. ___, 898 A.2d 109.

under state law is that the “proposed conditional use shall not result in an undue adverse effect”⁶⁰ on any of the following:

- (i) The capacity of existing or planned community facilities;⁶¹
- (ii) The character of the area affected as defined by the area’s zoning district and policies of the municipal plan;⁶²

⁶⁰ Prior to the permit reform bill enacted in 2004, conditional uses could not adversely affect the listed criteria. The Supreme Court eased this standard by prohibiting conditional uses only when they resulted in an adverse impact that was material. *In re Walker*, 156 Vt. 639, 588 A.2d 1058 (1991). Exactly what was intended or achieved by changing the standard to one of undue adverse effect is unclear. In the absence of regulations defining it, undue adversity is, at best, an ambiguous standard. The Vermont Supreme Court continues to strike down or at least restrict the meaning of ambiguous zoning ordinances.

⁶¹ Four-year phasing requirement for Planned Residential Development (“PRD”) may not be required because water, sewer, road, police and fire services were found to be adequate without phasing and no changes were anticipated to the school district within the four years that would accommodate the slight increase in student population due to the PRD. *In re: Appeal of Swanton Limited Partnership*, Docket No. E95-062 (Vt. Env’tl. Ct., Dec. 14, 1997).

Junkyard site located on isolated, private road not served by electricity, telephone or water adversely effects the capacity of the community’s existing fire and rescue facilities, even if no combustible or hazardous materials were expected to be present at the site. *In re: Appeal of Reiss*, Docket No. E96-115 (Vt. Env’tl. Ct., Oct. 29, 1996).

The cost of supplying power to a residence by means other than conventional utility lines is not relevant. *In re: Appeal of Andersen*, Docket No. E95-075 (Vt. Env’tl. Ct., Oct. 8, 1996).

⁶² Fact that residential home was purchased in an area clearly located in a commercial zone and surrounded by commercial uses may be considered in an analysis relevant to the “character of the area.” *In re: Appeal of Brown*, Docket No. E96-156 (Vt. Env’tl. Ct., June 27, 1997).

The Court could not make a finding that a junkyard would not adversely affect the character of an area without a professional analysis of groundwater flow and testimony from a person with experience in design of containment facilities to allow the Court to determine whether a particular design would be useful in protecting groundwater and protecting surrounding forest in the event of a fire. *In re: Appeal of Reiss*, Docket No. E96-156 (Vt. Env’tl. Ct., Oct. 29, 1996).

Placing a car wash and car detailing facility on a lot formerly used for automotive repair in a commercial area with other automotive uses nearby will not adversely effect the character of the area. *In re: Appeal of Blouin*, Docket No. E95-051 (Vt. Env’tl. Ct., Dec. 1, 1995).

Court cannot find from the evidence that the proposed project will adversely affect the character of the area affected beyond the level at which it has already been compromised by the interchange development. Rather, compared to the present barren design of the project site, the proposal should improve or at least protect the character of the area affected. *In re: Appeal of Spear Street/East Terrace Neighborhood Assn. (SETNA)*, Docket No. E96-045, *In re: Appeal of SETNA*, Docket No. E96-107, *In re: Appeal of Timberlake Assocs.*, Docket No. E96-169 (Vt. Env’tl. Ct., Jan. 28, 1998).

Applicant must maintain driveway to 14’ width with inside turning radii not less than 30’ and any cars using property in winter or when snow is on road must be equipped with snow tires. Applicant must maintain 50’ buffer along south boundary in addition to 75’ buffer required by deed on north boundary to maintain wooded, rural residential character of area. No outdoor events involving amplified music or consumption of alcohol will be allowed. No more than 32 persons, including caretaker, may stay overnight to avoid exceeding design flow of maximum 1,440 gallons of wastewater per day into septic system. *In re: Appeals of Vincent and June Sardi, et al.*, Docket Nos. 148-9-97 and 155-9-97 Vtec (Vt. Env’tl. Ct., Jan. 14, 1999).

Application for conditional use denied because its physical design towering over the surrounding field will adversely affect the character of the area and the failure to prevent the flotation of the septic tank and pump station and any fuel supply tanks in flood conditions adversely affects “other bylaws now in effect.” *Town of Highgate v.*

- (iii) Traffic on roads and highways in the vicinity;
- (iv) Bylaws and ordinances then in effect; and
- (v) Utilization of renewable energy resources.

24 V.S.A. §§ 4414(3)(A)(i)-(v).

The Vermont Supreme Court has repeatedly inserted a requirement of materiality. In other words, a conditional use approval can be denied only when there is a materially adverse effect. *See, e.g., In re: Walker*, 156 Vt. 639, 588 A.2d 1058 (1991).

The specific conditions that an ordinance may impose to supplement the general and mandatory conditions include regulations concerning the following:

- (i) Minimum lot size;
- (ii) Distance from adjacent or nearby uses;⁶³
- (iii) Performance standards;
- (iv) Criteria adopted relating to site plan review pursuant to 24 V.S.A. § 4416; and

Francis LaRocque and Andrew Pepin, Docket No. E96-172, *In re: Appeal of Francis LaRocque and Andrew Pepin*, Docket No. E97-132 (Vt. Env'tl. Ct., Mar. 17, 1998).

The number of cars parked in front of a building is an element of daily traffic load of the proposed project. To maintain the residential characteristics of the site, the Court imposed a condition limiting vehicles parked in front of the building. *In re: Appeal of Patricia Dorr*, Docket No. 142-7-98 Vtec (Vt. Env'tl. Ct., June 1, 1999).

The question of whether a proposed use adversely affects the character of the area is a question of fact and thus requires a hearing on the merits while the question of whether a proposed use is of the same general character as a permitted or conditional use is a question for the Court and thus is suitable for summary judgment. *In re: Appeal of Paul and Eileen Growald*, Docket No. 236-10-00 Vtec (Vt. Env'tl. Ct., Nov. 13, 2001).

Where the application proposes a three-unit transitional family housing plus an office, and the surrounding area includes multi-family residential, small business, home business, larger industrial business, small lots, and congested daytime on-street parking, the character of the area is not adversely affected as long as the proposal limits the proposed daytime on-street parking. *In re: Appeal of Good Samaritan Haven, Inc.*, Docket No. 158-10-01 Vtec (Vt. Env'tl. Ct., Dec. 12, 2001).

When assessing the "character of the area" as required under a zoning ordinance conditional use approval, the ZBA (or the Court in a *de novo* review) can only refer to potential adverse changes in the character of the area of the proposed project and cannot take into account (unless the zoning ordinance specifically provides) policy considerations like sprawl or social disruption in a village center. *Appeal of Armitage, et al.*, Docket No. 38-3-01 Vtec (Vt. Env'tl. Ct., Oct. 21, 2002).

See also In re: Appeals of Michael Williams, In re: Appeal of Ryan Brothers Electric and Michael Ryan, Docket Nos. 186-10-99, 90-4-00, and 216-9-00 Vtec (Vt. Env'tl. Ct., Sept. 28, 2001); *In re: Appeal of Russell Collins, Therese Collins, Gary Collins, and Ammie Collins*, Docket No. 267-11-00 Vtec (Vt. Env'tl. Ct., Dec. 7, 2001); *In re: Appeal of Shane Farrell*, Docket No. 74-5-99 Vtec (Vt. Env'tl. Ct., Apr. 7, 2000).

⁶³ Noise and car exhaust from customers stopped at, using or waiting to use ATM functions of a bank, are incompatible with the existing adjacent residential use which is ten feet from the common property line despite the fact that the area is designated for commercial uses. *In re: Appeal of Brown*, Docket No. E96-156 (Vt. Env'tl. Ct., June 27, 1997); *see also In re: Appeal of Shane Farrell*, Docket No. 74-5-99 Vtec (Vt. Env'tl. Ct., Apr. 7, 2000).

(v) Any other standards and factors that the bylaws may include.⁶⁴

24 V.S.A. §§ 4414(3)(B)(i)-(v).

D. Variations

A variance is an authorization to deviate from the requirements of a zoning ordinance not otherwise allowed as a waiver⁶⁵ pursuant to 24 V.S.A. § 4414(a)(1)(8).⁶⁶ More often than not, a variance request involves a dimensional standard in the ordinance such as minimum lot size or minimum setbacks from boundaries.⁶⁷ Occasionally, a person may seek permission to use his or her property for a use prohibited by the zoning ordinance. In Vermont, dimensional variances and use variances are treated in the same fashion, and both must meet the five criteria set forth in 24 V.S.A. § 4469. *Gadhue v. Marcotte*, 141 Vt. 238, 446 A.2d 375 (1982); *Appeal of John T. Adams*, Docket No. 227-10-02 Vtec (Vt. Env'tl. Ct., Jan. 13, 2003); *In re: Appeal of David and Joyce Fifield*, Docket No. 198-9-00 Vtec (Vt. Env'tl. Ct., Dec. 26, 2001); *In re: Appeal of Ernest Levesque, Jr. & City of South Burlington v. Ernest and Donna Levesque*, Docket Nos. 175-8-00

⁶⁴ It is not unreasonable for the Zoning Regulations to allow a wider potential scope for conditional uses in the “Commercial-Industrial” and “Commercial and Residential” zoning districts, subject to their meeting the conditional use standards of the state statute. *In re: Appeal of LiCausi, et al., In re: Appeal of John A. Russell Corp. and Crushed Rock, Inc.* Docket Nos. 203-11-98, 77-5-99, 230-11-99 Vtec (Vt. Env'tl. Ct., Jan. 5, 2000).

Language that conditional use does not adversely affect the goals and objectives in the Town Plan, incorporates all the provisions of the Town Plan and makes them enforceable. *In re: Appeal of Andersen*, Docket No. E95-075 (Vt. Env'tl. Ct., Mar. 25, 1996).

While the proposal is not wholly inconsistent with the Municipal Plan in that it does promote scattered affordable housing rather than concentrated, it fails to meet the guidance criteria for transportation as well as the purpose of the Plan. *Appeal of Lamoille Housing Partnership and R. Bruce Nourjian*, Docket No. 19-2-03 Vtec (Vt. Env'tl. Ct., Apr. 30, 2004).

⁶⁵ Waivers can be granted by meeting the particular standards in a zoning ordinance, which are usually much less rigorous than the standards that must be satisfied for a variance.

⁶⁶ Under state enabling statute, 24 V.S.A. § 4469, the ZBA (or the Development Review Board), and not the planning commission, has authority to act on variance applications. *In re: Appeal of Annalou Kittell, Leigh D. Kittell and Ray C. Kittell*, Docket No. 71-4-98 Vtec (Vt. Env'tl. Ct., Dec. 28, 1998).

No variance is required to change from one conditional use to another conditional use in a noncomplying building. *In re: Appeals of Richard Deso*, Docket Nos. 131-8-97 and 156-9-97 Vtec (Vt. Env'tl. Ct., Dec. 28, 1998).

⁶⁷ Applicant sought and was denied application for a variance for septic design on two of five parcels in a subdivision. *Appeals of Rowley*, Docket No. 96-6-99 Vtec (Vt. Env'tl. Ct., Jan. 27, 2003).

and 94-5-00 Vtec (Vt. Env'tl. Ct., Oct. 12, 2001); *In re: Appeal of Omer Martin*, Docket No. 34-3-99 Vtec (Vt. Env'tl. Ct., Apr. 19, 2000); *In re: Appeal of James Harrison and Janet Harrison*, Docket No. 180-10-98 Vtec (Vt. Env'tl. Ct., Feb. 23, 2000); *In re: Appeal of Eldredge L. Bermingham and Pamela Bermingham*, Docket No. 110-7-97 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999); *In re: Appeal of Phillip Mayo*, Docket No. 149-8-98 Vtec (Vt. Env'tl. Ct., Feb. 24, 1999); *In re: Appeal of Brown*, Docket No. E96-156 (Vt. Env'tl. Ct., June 27, 1997); *In re: Appeal of Nicholas and Lorena Menduni*, Docket No. E95-068 (Vt. Env'tl. Ct., Apr. 24, 1996). Some students of Vermont land use law suggest that zoning boards cannot grant use variances. This rationale is based on the state enabling statute specifically prohibiting boards of adjustment from amending or altering a zoning ordinance. 24 V.S.A. § 4473. The prevailing view in most jurisdictions, however, recognizes use variances if the applicant can meet the enumerated variance criteria.⁶⁸

A variance request can be granted only if it meets all five criteria set forth in 24 V.S.A. § 4469. *Blow v. Town of Berlin Zoning Administrator*, 151 Vt. 333, 560 A.2d 378 (1989). Although ZBAs often apply these standards loosely and, for example, grant variances for all projects without apparent opposition, a careful review of the five criteria in § 4469 demonstrates the difficulty one will encounter in seeking a variance. Courts interpret the criteria strictly, and rarely do courts sustain the granting of a variance.⁶⁹

⁶⁸ *In re: Appeal of Donald Turco*, Docket No. E95-052 (Vt. Env'tl. Ct., Aug. 28, 1995), appears to allow a use variance although the case is unclear.

⁶⁹ An existing small lot slightly larger than 1/8 acre and in existence when the bylaws were enacted received a variance for construction of a real estate office. Judge Wright upheld the issuance noting that if any construction is to be approved, a variance will be required because the front and rear setbacks overlap. Under the five criteria: 1) the unusual shallowness of the lot is the cause of the hardship; 2) there is no way the property can be developed without a variance from the setbacks; 3) the applicant did not create the shallow shaped parcel; 4) the proposal will

Criterion 1 - Unique Physical Conditions Causing Unnecessary Hardship.

This criterion focuses on land – not landowners. The unique physical circumstances or conditions often relate to topographical features such as a ravine, gully or ledge.⁷⁰ The presence of a leach field has been determined not to constitute a unique physical condition, nor is the presence of a historic inn in the area a unique physical circumstance. *Sorg v. North Hero Zoning Board*, 135 Vt. 423, 378 A.2d 98 (1977). On the other hand, the location of a house close to a road on which traffic has increased dramatically since the house was built is a hardship justifying a variance for the construction of a noise reduction fence. *In re: Appeal of Aube-Hinsdale*, Docket No. E95-078 (Vt. Env'tl. Ct., Mar. 8, 1995).

The hardship component of this standard must inhere in the property and not be caused by the zoning in the neighborhood.⁷¹ Indeed, courts have construed hardship as a deprivation of all beneficial use of one's property, or in a commercial sense, the inability to generate a reasonable return from the land. A desire for a more profitable use of property does not constitute a hardship. *Application of McDonald's Corp.*, 151 Vt. 346, 560 A.2d 362 (1989); *In re: Appeal of Ernest Levesque, Jr., City of South Burlington v. Ernest and Donna Levesque*, Docket Nos. 175-8-00 and 94-5-00 Vtec (Vt. Env'tl. Ct., Oct. 12, 2001). Likewise, a mere inconvenience or the possibility of lost profits do not rise to the level of the requisite hardship. *In re: Cumberland Farms, Inc.*, 151 Vt.

not alter the character of the area; and 5) construction of a real estate office is the minimum necessary to afford relief. *Appeal of Richard E. Bailey*, Docket No. 230-10-02 Vtec (Vt. Env'tl. Ct., May 7, 2003).

⁷⁰ The presence of ledge within the building envelope is not a unique physical circumstance or condition particular to the property when with expenditure of money to remove a portion of the ledge and move the power line the property can be developed in conformity with the provisions of the zoning bylaws. *In re: Appeal of Allen Mullheron; Town of Highgate v. Allen Mullheron*, Docket No. 217-9-00 Vtec (Vt. Env'tl. Ct., Jan. 16, 2002).

⁷¹ A proposal to increase the height of an existing two-story house to a three-story house denied because the restriction was common to the zoning regulations and not due to unique physical characteristics of the property. *In re: Appeal of Gary Audet, d/b/a Audet Management Associates*, Docket No. 89-4-00 Vtec (Vt. Env'tl. Ct., Sept. 28, 2000).

59, 557 A.2d 486 (1989); *In re: Appeal of John R. Mullen*, Docket No. 259-12-99 Vtec (Vt. Env'tl. Ct., Mar. 7, 2002).⁷²

Criterion 2 - Because of the Unique Physical Circumstances or Conditions There is No Possibility the Land Can Be Developed In Strict Conformity with Zoning Requirements and a Variance is Necessary to Permit Reasonable Use of Property.

This criterion is not satisfied if any reasonable use of the property is possible in strict conformity with the zoning regulations. A landowner is not deprived of the reasonable use of his or her property if it is already developed.⁷³ *Gadhue v. Marcotte*, 141 Vt. 238, 446 A.2d 375 (1982); *Appeal of Linda Boisvert and Hugh McGee*, Docket No. 193-8-02 Vtec (Vt. Env'tl. Ct., May 5, 2003); *Appeal of Pierre R. Pepin and Betty Pepin*, Docket No. 225-10-02 Vtec (Vt. Env'tl. Ct., Aug. 11, 2003).⁷⁴

Criterion 3 – The Hardship Cannot Be Self-Created.

⁷² Health concerns from a small living space and restrictions on the size of a professional library are not the types of hardships contemplated by the statute. *In re: Appeal of Nicholas and Lorena Menduni*, Docket No. E95-068 (Vt. Env'tl. Ct., Apr. 24, 1996).

⁷³ If the property that is the subject of a variance application is already developed with a two-unit residential building, a variance is not necessary to enable the reasonable use of the property. *In re: Appeal of Gary Audet, d/b/a Audet Management Associates*, Docket No. 89-4-00 Vtec (Vt. Env'tl. Ct., Sept. 28, 2000).

⁷⁴ A landowner already owning a home on a property cannot obtain variance to construct a garage because he is already making reasonable use of his property. *In re: Appeal of Victor Csabrajetz*, Docket No. E96-160 (Vt. Env'tl. Ct., June 2, 1997).

Appellant seeking variance from minimum seasonal high groundwater depth for purposes of installing a septic system to residential development on a more than ten-acre parcel of land did not meet criteria 2 of 24 V.S.A. § 4468(a) [now § 4469] because there was no finding that absent a variance there is no possibility due to the property's unique physical circumstances that the property can be developed in conformity with the zoning regulations. The Environmental Court interpreted this provision to mean that a variance must be denied unless it is necessary to enable Appellant to make any reasonable use of the property. *In re: Appeal of William Humphrey*, Docket No. E95-036 (Vt. Env'tl. Ct., Dec. 4, 1995). Expansion to add decks is not necessary to make reasonable use of a property already used for two dwelling units. *In re: Appeal of Ernest L. Levesque, Jr. and Donna L. Levesque*, Docket No. E95-158 (Vt. Env'tl. Ct., May 21, 1996).

Applicant's application for a variance from the setback requirements of the Town's Mobile Home Park District regulations is denied, but applicant has a right to alter, move or enlarge the pre-existing shed, so long as the alteration, moving or enlargement does not increase its noncompliance with the side and rear setbacks or create any new noncompliance. *In re: Appeal of Gary P. Bevins, Town of Colchester v. Gary P. Bevins*, Docket Nos. 177-11-97 and 13-1-98 Vtec (Vt. Env'tl. Ct., July 6, 1998).

The financial hardship of the landowner is not a consideration for board members in their review of variance requests. Ordinarily, a financial hardship is self-created, and thus violates this criterion. The mere purchase of a lot does not constitute a self-created hardship if the previous owner had been entitled to a variance. *Lewis v. Pickering*, 134 Vt. 22, 349 A.2d 715 (1975); *In re: Appeal of John R. Mullen*, Docket No. 259-12-99 Vtec (Vt. Env'tl. Ct., Mar. 7, 2002); *In re: Ernest and Janet Marcelino*, Docket Nos. 181-11-97 and 122-7-99 Vtec (Vt. Env'tl. Ct., July 19, 2000). By purchasing a property with an existing structure that violates the front setback, appellants also are considered under the law to have created their own hardship. *In re: Appeal of Ran-Mar, Inc.*, Docket No. 268-11-00 Vtec (Vt. Env'tl. Ct., May 10, 2001); *In re: Appeal of Thomas and Janice Bachelder*, Docket No. 161-9-99 Vtec (Vt. Env'tl. Ct., Sept. 13, 2000); *In re: Appeal of Mathias Stori*, Docket No. 89-5-98 Vtec (Vt. Env'tl. Ct., Apr. 27, 1999). If a smaller parcel is carved out of a larger parcel, the resulting hardship is self-created. *In re: Ray Reilly Tire Mart, Inc.*, 141 Vt. 330, 449 A.2d 910 (1982). For the purposes of 24 V.S.A. § 4469(a)(3), if a predecessor created the hardship that applicant seeks to cure through a variance, the applicant is not entitled to a variance because the hardship was created by that preceding owner. *In re: Appeal of William Humphrey*, Docket No. E95-034 (Vt. Env'tl. Ct., Dec. 4, 1995). Hence, the applicant for a variance acquires both the benefits and the burdens of predecessors in the chain of title.

An accidental violation of an ordinance is a self-created hardship if the landowner could have avoided the mistake. *In re: Application of Fecteau*, 149 Vt. 319, 543 A.2d 693 (1988).

Criterion 4 - Variance Cannot Alter Essential Character of the Neighborhood Nor Impair Use of Adjacent Property, Nor Be Detrimental to Public Welfare.

The Environmental Court reached an apparently inconsistent result in *In re: Appeal of Donald Turco*, Docket No. E95-052 (Vt. Env'tl. Ct., Aug. 28, 1995). That decision permitted the expansion of a building housing an auto repair business on a lot already occupied by two houses and the auto repair business.

To obtain a variance, the property owner must demonstrate that the variance will not be a detriment to the neighborhood. Examples of detriment might be an office building located in a residential neighborhood or traffic generated by the proposed use that imperils children's safety. The Environmental Court has ruled that the neighbors' consent to the issuance of a variance can be received as evidence on this issue. *In re: Appeal of Donald Turco*, Docket No. E95-052 (Vt. Env'tl. Ct., Aug. 28, 1995). When assessing the character of the area, the area in the analysis is not restricted to the zoning district (e.g., Commercial) but includes the entire area affected by the proposal. *In re: Appeal of Sno-Cross*, Docket No 206-9-00 Vtec (Vt. Env'tl. Ct., Jan. 30, 2002).

Criterion 5 - Variance Must Be Minimal – The Least Possible Deviation from Zoning Requirements.

In reviewing a proposal to reconstruct a failing shed roof, the Vermont Supreme Court ruled that a 6-foot variance violates this criterion when the evidence demonstrated less than 6 feet was possible. *In re: Maurice Memorials*, 142 Vt. 532, 458 A.2d 1093 (1983). Where a proposal does not represent the least possible deviation, the variance may be granted with the condition that the proposal be adjusted to the minimum variance necessary. *In re: Appeal of Omer Martin*, Docket No. 34-3-99 Vtec (Vt. Env'tl. Ct., Apr. 19, 2000).

E. Appeals of Decisions of Zoning Administrator

Zoning boards of adjustment also exist “[t]o hear and decide appeals . . . where it is alleged that an error has been committed in any order, requirement, decision or determination made by an administrative officer . . . in connection with the administration or enforcement of a bylaw.” 24 V.S.A. § 4465(c)(1). Zoning administrators must interpret the zoning regulations literally, and may not permit development that is not in conformity with the provisions of the zoning ordinance. 24

V.S.A. § 4448(a).⁷⁵ Any determination made by an administrator in fulfilling these responsibilities is appealable to the ZBA. The issuance of a zoning permit is as much an appealable determination as a denial of a permit.⁷⁶

Appeals are perfected by filing a notice of appeal⁷⁷ with the secretary of the ZBA within fifteen (15) days of the administrator's decision.⁷⁸ 24 V.S.A. § 4465(a). A notice of appeal must

⁷⁵ Due process requires that a notice of a zoning violation must inform the defendant how to contest the decision and the mere availability of a statutory procedure, without informing the defendant of that procedure, is insufficient. *Town of Randolph v. Estate of White*, 166 Vt. 280, 693 A.2d 694 (1997); *In re: Appeal of M.T. Assocs. and Midway Oil Corp.*, Docket No. 192-12-97 Vtec (Vt. Env'tl. Ct., Oct. 28, 1998).

A landowner who holds an issued permit need not construct what he or she has applied to construct. Because the zoning regulations automatically void a permit that has not been acted on within the year, appellant's permit expired by operation of law, and appellant is entitled to continue the uses allowed under the prior permit. *In re: Appeal of Jeff Sullivan*, Docket No. 10-1-98 Vtec (Vt. Env'tl. Ct., Apr. 13, 1999).

⁷⁶ A permit that has been granted and has not been appealed cannot later be "invalidated" unilaterally after the appeal period has run, whether by action of the zoning administrator or of the DRB. *In re: Appeal of Roxane LaCroix, Trustee of LaCroix Family Limited Partnership Trust*, Docket No. 56-3-98 Vtec (Vt. Env'tl. Ct., Nov. 16, 1998).

Where public health, safety or welfare issues are implicated by incorrect issuance of a permit, a municipality may withdraw the permit, although it may also be held responsible under the principles of estoppel for the costs of a party's reliance on the incorrectly issued permit. *In re: Appeal of Raney L. Hurlburt, Laurie Hurlburt, Richard Desmarais and Tina Desmarais*, Docket No. 27-2-98 Vtec (Vt. Env'tl. Ct., Feb. 12, 1999).

Even a permit that has been issued without authority, or under a misapplication of the law, may not be appealed or collaterally attacked after the expiration of the time for appeal. However, such a permit may be enforced according to its terms. *Id.*; see also *In re: Appeal of Donald Metzger, Gail Metzger, and Stephen Howard*, Docket No. 275-12-00 Vtec (Vt. Env'tl. Ct., Sept. 24, 2001); *In re: Appeal of Robert and Angela Conrad*, Docket No. 52-3-00 Vtec (Vt. Env'tl. Ct., Mar. 26, 2001).

"The mere entry of a date at the foot of the zoning application form, without any indication of whether the permit was ultimately approved or denied, is not an appealable zoning administrator action." *In re: Appeal of Megan Price*, Docket No. 202-10-99 Vtec (Vt. Env'tl. Ct., May 22, 2001).

While the unappealed zoning permit must now stand unchallenged, the scope or extent of that permit may be the subject of further decisions of a ZBA, and may thereafter be subject to the judicial review. *In re: Appeal of David Jackson*, Docket No. 165-9-99 Vtec (Vt. Env'tl. Ct., May 22, 2000).

⁷⁷ Only interested persons as described by 24 V.S.A. § 4465(b) and in the next section can file such notices.

⁷⁸ When a zoning administrator responds to a letter or inquiry, not required by statute, the only sensible way to measure the running of the relatively short 15-day appeal period for that "act or decision" of the zoning administrator is from the postmark date of that ruling. *In re: Appeal of Charles Lucia, Eleanor Lucia, Jeffrey Gooley and Carol Gooley*, Docket No. 194-12-97 Vtec (Vt. Env'tl. Ct., Dec. 29, 1998).

“include the name and address of the appellant, a brief description of the property with respect to which the appeal is taken, a reference to the regulatory provisions applicable to that appeal, the relief requested by the appellant, and the alleged grounds why the requested relief is believed proper under the circumstances.” 24 V.S.A. § 4466.

IV. Development Review Boards

Effective March 15, 1995, Vermont municipalities can create development review boards (“DRBs”). The idea is to permit one municipal board to review projects rather than two as usually happens now if the ZBA and planning commission are involved.

In addition, a DRB may take positions that become rebuttable presumptions on certain Act 250 criteria, including the impact of a project in educational services or municipal services and conformance to the town plan. All of the following have to be true for a DRB to assume that Act 250 jurisdiction:

- (1) The criteria specified in this section have been adopted in the appropriate bylaws authorized under this chapter.
- (2) The municipality’s plan has been duly adopted, under the provisions of this chapter.
- (3) The municipality has adopted zoning bylaws and subdivision bylaws, either separately or incorporated into one unified development bylaw.

If the decision was placed in the stream of mail so that certified mail delivery was attempted within the following few days and the failure to achieve delivery was due to absence or a failure to instruct an agent to receive or deal with mail in a timely fashion, then the delay is attributable to appellee and the matter should be dismissed due to a failure to file a timely appeal with the DRB. If the decision was either not actually placed in the stream of mail due to a failure on the part of the zoning administrator or his agent or if delivery was not attempted within that time due to a failure in the operation of the U.S. Postal Service, then the delay was not attributable to appellee and the appeal should proceed on its merits. Absent other evidence, the Environmental Court presumes regularity in the U.S. Postal Service. *In re: Appeal of M.T. Assocs. and Midway Oil Corp.*, Docket No. 192-12-97 Vtec (Vt. Env’tl. Ct., Sept. 21, 1998).

Any action of zoning administrator may be appealed to the ZBA, in which case, the zoning administrator himself should be disqualified from sitting as a member, or chairman, of the ZBA while it considers that appeal. *In re: Appeal of Annalou Kittell, Leigh D. Kittell, and Ray C. Kittell*, Docket No. 71-4-98 Vtec (Vt. Env’tl. Ct., June 14, 1999).

- (4) The municipality has adopted, for purposes of this section, the municipal administrative procedure act established in chapter 36 of this title.
- (5) A development review board has been created and has been authorized to undertake local Act 250 review of municipal impacts caused by a development or subdivision, or both, as the terms “development” and “subdivision” are defined in 10 V.S.A. chapter 151.

24 V.S.A. §§ 4420 (a)(1)–(5).

As a matter of practice, DRB’s follow procedures more like those applicable to ZBAs, even in applying standards previously subject to review by Planning Commissions.

V. Other Issues

A. Impact Fees

A municipality may require developers to pay impact fees in addition to meeting the design standards for their development. An impact fee attempts to defray new costs arising from the development. For example, a developer may be required to install sewer lines in its subdivision. The sewerage, however, has to pass through other pipes to reach the sewerage plant, which someday must be expanded to accommodate growth. A town can charge impact fees to finance such out-of-subdivision costs.

Impact fees can be charged only if certain provisions are followed. Under 24 V.S.A. § 5203, to charge impact fees, a municipality must have:

- (1) A plan that has been confirmed under section 4350 of Title 24 and, after July 1, 1992, adopted a capital budget and program pursuant to chapter 117 of Title 24. The plan or capital budget and program may include:
 - (A) indication of locations proposed for development with a potential to create the need for new capital projects;
 - (B) standards for level of service for the capital projects to be fully or partially funded with impact fees;
 - (C) proposed locations and project lists, cost estimates and funding sources;

- (D) timing or sequence of development in the identified locations; and
- (2) Developed a reasonable formula that will be used to assess a developer's impact fee. The formula shall reflect the level of service for the capital project to be funded and a means of assessing the impact associated with the development such as square footage or number of bedrooms. The level of service shall be either:
 - (A) an existing level of service;
 - (B) a state or federal standard; or
 - (C) a standard adopted as part of a town plan or capital budget.

24 V.S.A. §§ 5203(a)(1) and (2).

In determining the amount of the fee to be charged, the municipality may consider:

- (1) the cost of the existing or proposed facility;
- (2) the means, including state or federal grants and fees paid by other developers, by which the facility has been or will be financed;
- (3) the extent, if any, to which impact fees should be offset to account for other taxes or fees paid by the developer that will cover the cost of the capital project;
- (4) extraordinary costs incurred by the municipality in serving the new development;
- (5) the time-price differential inherent in fair comparisons of amounts paid at different times.

24 V.S.A. §§ 5203(c)(1)(5).

In *Robes v. Town of Hartford*, 161 Vt. 187, 636 A.2d 342 (1993), the Vermont Supreme Court indicated a willingness to accept any reasonable justification for the amount of an impact fee. The municipality must spend the fee on the capital project for which the fee was intended within six years. If it fails to do so, the developer may apply for a refund in year seven. 24 V.S.A. § 5203(e).

After the statutory changes effective on July 1, 2004, the authority of the DRB to impose an impact fee as a condition of a development permit is governed by amended 24 V.S.A. § 4464(b)(2), which states that “[a] bylaw may provide for the conditioning of permit issuance on the submission of a bond, escrow account, or other surety . . . to assure . . . protection of public facilities that may be affected by a project.” If monetary mitigation is to be imposed as a condition of a permit under the zoning power, instead of through the separate impact fee statute, it must be provided for in a zoning bylaw. *Appeal of the A. Johnson Company*, Docket No. 220-12-03 Vtec (Vt. Env’tl. Ct., Dec. 23, 2004).

B. Deemed Approval

If a decision is not made within statutory deadlines following hearing,⁷⁹ the application is approved by action of law or it is deemed approved.⁸⁰ This remedy is disfavored by courts, which apply it no more often than the statute requires them to do.⁸¹ The “deemed approval”

⁷⁹ The Vermont Supreme Court held that the “deemed approved” period begins at the last public hearing, and does not wait to commence with the last “deliberative session.” Since the 60-day period had run out prior to the DRB decision, deemed approval was an appropriate remedy. *In re McEwing Services, LLC*, 2004 VT 53, 177 Vt. 38, 857 A.2d 299. For a case where an application was approved using the deemed approval remedy, see *Appeal of Rawlings*, Docket No. 37-3-03 Vtec (Vt. Env’tl. Ct., June 13, 2003).

⁸⁰ For denial of deemed approval remedy, see *Appeal of Barnes*, Docket No. 154-8-04 Vtec (Vt. Env’tl. Ct., May 18, 2005); *Appeal of Comi*, Docket No. 214-11-04 Vtec (Vt. Env’tl. Ct., Mar. 13, 2005); *Appeal of Nixon, et. al.* Docket No. 154-8-04 Vtec (Vt. Env’tl. Ct. Mar. 31, 2005); *Appeal of Lovell*, Docket No. 194-10-04 Vtec (Vt. Env’tl. Ct., Sept. 6, 2005); “[i]n a situation where the DRB makes a final decision within 45 days of the hearing on the issue, purported procedural defects and deficiencies in the DRB’s decision are not sufficient to warrant the Court’s overturning of the DRB decision and then applying the ‘deemed approved’ remedy.” *Appeal of Wilkins Properties, LLC*, Docket No. 176-10-04 Vtec (Vt. Env’tl. Ct., Nov. 3, 2005); *Appeal of Griffin*, Docket No. 92-6-04 Vtec (Vt. Env’tl. Ct., May 23, 2005); “The Planning Commission is free to continue a hearing from one meeting to another, without consent of the applicant, and without triggering the automatic approval remedy, as long as the testimony has not closed.” *Appeal of County of Windsor*, Docket No. 155-9-03 Vtec (Vt. Env’tl. Ct., Jan. 20, 2004); *Appeal of Richard Angelino*, Docket No. 261-11-02 Vtec (Vt. Env’tl. Ct., May 22, 2003); *In re: Appeal of George and Barbara Stokes*, Docket No. 169-8-00 Vtec (Vt. Env’tl. Ct., April 16, 2001).

⁸¹ Delay between filing of joint permit in October 1996 and the holding of the hearing in May 1997 was excessive, but it does not result in a deemed approval under 24 V.S.A. § 4470(a) [now § 4464(b)(1)]. That section only requires that the decision be rendered within 45 days of completing the hearing. It does not provide any consequences for a delay between filing the application and scheduling it for a hearing. *In re: Appeal of Annalou Kittell, Leigh D. Kittell, and Ray C. Kittell*, Docket No. 71-4-98 Vtec (Vt. Env’tl. Ct., June 14, 1999).

remedy is also strictly applied because in the case of a delayed permit denial, deemed approval often operates to grant a permit wholly at odds with the zoning ordinance. The applicant may waive restrictions of this nature. *See Village of Woodstock v. Bijan Bahramian*, 160 Vt. 417, 631 A.2d 1129 (1993). Deemed approval is avoided by voting on the record at a hearing. The timing of the written decision thereafter only affects the timing of an appeal. *In re: Appeals of Bennington Coalition for the Homeless and North Bennington Congregational Church*, Docket Nos. E95-136 and E96-025 (Vt. Env'tl. Ct., June 7, 1996). The zoning board made a timely decision, even though the decision issued within the forty-five (45) day period contained inadequate findings. *City of Rutland v. McDonald's Corp.*, 146 Vt. 324, 503 A.2d 1138 (1985).⁸²

Deliberative meetings of the Zoning Board of Adjustment are not subject to Open Meeting Law requirements. Nor must the decision be adopted in an open meeting if the decision is a public record. A zoning bylaw, however, can require all meetings to be open. *In re: Appeal of Mark and Tina Atwood*, Docket No. E95-038 (Vt. Env'tl. Ct., July 3, 1995). Deliberative meetings do not, however, extend the time within which the ZBA must make a decision in order

It is clear that ZBA did not vote on the variance request at the May 8, 1997 hearing. Without such a vote, the ZBA did not render a decision (regardless of when or whether the ultimate decision or the May 8, 1997 minutes were ever conveyed to appellants). This is the type of delay or inaction on the part of the ZBA for which the deemed approval remedy is reserved. The variance should have been deemed approved on or about June 22, 1997, 45 days after the May 8, 1997 hearing. *Id.*

⁸² The deemed approval remedy is a drastic one that can lead to granting permits that are wholly inconsistent with the zoning regulations of a municipality to the detriment of a project's surrounding landowners. Therefore, it should be reserved for instances of inaction on the part of the municipal body. *In re: Appeal of Wesco, Inc. and Simendinger*, Docket No. E96-010 (Vt. Env'tl. Ct., Sept. 3, 1996).

Where change of use permit for gas station is denied because it will adversely affect the character of the area, subsequent conditional use and site plan approval permits relating to the same project upon which no action was taken do not receive deemed approval status because the Town was under no obligation to consider them since project failed to receive the first necessary permit. *Id.*

to avoid deemed approval. The clock begins with the last public hearing and does not include deliberative sessions. *In re McEwing Services, LLC*, 2004 VT 53, 177 Vt. 38, 857 A.2d 299.

Because decisions of the ZBA require a majority of the entire membership, a project may be deemed approved if an insufficient number of board members attend meetings to vote. Deemed approval is avoided, however, when a board announces a denial within the allowed time and it is obvious that a majority of members have either voted against approval or abstained from voting due to a conflict of interest. *In re: Appeal of Newton Enterprises*, 167 Vt. 459, 708 A.2d 914 (1998).

An applicant can effectuate the “deemed approval” remedy only by filing an appeal with the Environmental Court. *In re Ashline*, 175 Vt. 203, 820 A.2d 579 (2003). Where a zoning board of adjustment issues a decision supported by less than a majority of the membership, denying the application, such decision is valid unless the applicant files a timely appeal. *Id.*

C. Notice and Finality

Public hearings to review projects may be held on fifteen days’ public notice given as follows:

- (1) the publication of the date, place and purpose of the hearing in a newspaper of general publication in the municipality affected; [and]
- (2) the posting of the same information in three or more public places within the municipality.

24 V.S.A. § 4444(a).

In addition, for permits for the development of land requiring related or additional state permits the applicant should be informed by the municipal administrative official that additional or related permits are needed from the state. Nevertheless, it is the applicant’s responsibility to

identify, apply for and obtain all necessary state permits from the appropriate agencies. 24 V.S.A. § 4448(c).

Assuming proper permit applications are filed, permits issue and such notice as is necessary is given, decisions become final if no appeal is taken within the statutory deadlines. 24 V.S.A. § 4472(d); *Levy v. Town of St. Albans*, 152 Vt. 139, 564 A.2d 1361 (1989); *Town of Goshen v. Bernadette Gionet and Albert Gionet*, Docket No. 43-3-98 Vtec (Vt. Env'tl. Ct., Jan. 5, 1999); *In re: Appeal of Richard and Karen Babcock*, Docket No. 66-5-97 Vtec (Vt. Env'tl. Ct., Oct. 5, 1998); *In re: Appeal of Joseph and Joan Long*, Docket No. E95-027 (Vt. Env'tl. Ct., Mar. 1, 1996). Otherwise, decisions may not be final. *Town of Goshen v. Bernadette Gionet and Albert Gionet*, Docket No. 43-3-98 Vtec (Vt. Env'tl. Ct., Jan. 5, 1999); *In re: Appeal of Shantee Point Estates, Inc.*, Docket No. 169-9-98 Vtec (Vt. Env'tl. Ct., June 1, 1999); *In re: Appeal of Richard and Karen Babcock*, Docket No. 66-5-97 Vtec (Vt. Env'tl. Ct., Oct. 5, 1998).⁸³ If an

⁸³ The Court lacked jurisdiction over first application because it was not timely appealed. However, the Court had jurisdiction over appeal of second application, which was timely filed, because the second application had different dimensions and setbacks than the first. *In re: Appeal of Annalou Kittell, Leigh D. Kittell, and Ray C. Kittell*, Docket No. 71-4-98 Vtec (Vt. Env'tl. Ct., Dec. 28, 1998).

Principles of finality do not apply to bar appellants' appeal because they do not seek to appeal the 1987 conditional use approval; rather, they seek to enforce its terms and conditions. *In re: Appeal of Freeman, et al.*, Docket No. 163-10-96 Vtec (Vt. Env'tl. Ct., Oct. 6, 1998).

24 V.S.A. § 4472 allows for constitutional challenges to a zoning ordinance to be filed (in Superior Court) even if a timely appeal was not taken before the municipal body. *In re: Appeal of Barbara Wright, et al.*, Docket No. 35-2-98 Vtec (Vt. Env'tl. Ct., Dec. 18, 1998).

The ZBA lacked authority to amend the planning commission's 1996 permit, but had authority to establish conditions that, if followed, would allow the District to avoid the Town's taking further enforcement action. *In re: Appeal of Winooski Valley Park District*, Docket No. 201-11-98 Vtec (Vt. Env'tl. Ct., June 14, 1999).

If right-of-way is not entirely traversable by vehicles, that fact may give rise to an enforcement action, but it is not grounds to "invalidate" the permit, even if there is authority in the zoning enabling act to take such action. *In re: Appeal of Jeffrey T. Smith*, Docket No. 186-11-97 Vtec (Vt. Env'tl. Ct., Jan. 4, 1999).

Because the entire 40' x 70' gravel area had been created as of the date of the issuance of the Certificate of Occupancy and no party appealed the issuance of the 1996 Certificate of Occupancy, the 40' x 70' gravel area may remain and no permit is required for its construction. *In re: Appeal of Jeff Sullivan*, Docket No. 10-1-98 Vtec (Vt. Env'tl. Ct., Apr. 13, 1999).

The issuance of the building permit to applicants in 1996 was final. A town, however, is entitled to enforce against construction or operation that extends beyond the scope of a permit. *In re: Appeal of Ernest and Janet Marcelino*, Docket No. 181-11-97 Vtec (Vt. Env'tl. Ct., Nov. 23, 1998).

application is denied, and no appeal is taken, the applicant must either change the proposal or demonstrate a change in circumstances for the proposal to be considered again.⁸⁴ Similarly, an applicant who wishes to change a condition material to the approval of a proposal must demonstrate a change in circumstances to consider the change or elimination of such condition.⁸⁵

The public notice requirement is jurisdictional. Thus, a ZBA cannot convert a noticed hearing on a permitted use application into a hearing on a conditional use permit without notice.⁸⁶ *In re Torres*, 154 Vt. 233, 575 A.2d 193 (1990). Similarly, the unauthorized issuance

⁸⁴ Appellant cannot contest definition of building as seasonal because he failed to appeal three prior actions by zoning administrator restricting the use of the property to seasonal use. *In re: Appeal of Major*, Docket No. E97-078 (Vt. Env'tl. Ct., Oct. 22, 1997).

There is no bar to appellant's proceeding with site plan application for four-dispenser design, even though the associated conditional use application is on appeal at the Supreme Court because the site plan application was not previously ruled on at the municipal level or in Environmental Court and is not before the Supreme Court. *In re: Appeals of Wesco*, Docket Nos. 4-1-99 and 56-4-99 Vtec (Vt. Env'tl. Ct., June 15, 1999).

⁸⁵ The 1991 subdivision permit and its conditions cannot now be challenged, as the permit was not appealed. Therefore, even though the definition of "lot" as contiguous land means that Lot 1 would have qualified as three existing lots because it is divided by a highway and a river, the terms of the unappealed permit now require it to undergo major subdivision review for the three parcels to be separately transferred or developed. *In re: Appeal of Leona McWayne*, Docket No. 101-6-98 Vtec (Vt. Env'tl. Ct., Jan. 4, 1999).

Nothing in statute or regulations deprives an applicant of the right to have an application ruled on if a conditional use permit or variance was issued for the property at some time in the past. Landowners are entitled to have each application addressed on its merits. A zoning board may decline to consider a subsequent application only in the case of successive applications for the same type of approval for the same project. The change of use application before the Court does not represent a successive application for the same type of approval as previously denied because the ZBA had not previously acted on its merits. *In re: Appeal of Jeff and Anne Miserocchi*, Docket No. 27-3-97 Vtec (Vt. Env'tl. Ct., June 29, 1998), *rev'd on other grounds* 170 Vt. 320, 749 A.2d 607 (2000).

Amendment of zoning regulations to allow conversion of occupancy from seasonal to year-round on approval by ZBA or fact that municipal sewer service is planned to serve appellant's property is a sufficient change in circumstances to allow a new application. *In re: Appeal of Joanne Bergeron*, Docket No. 40-3-98 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999); *Town of Colchester v. Lawrence Major, Jr. and Mary Jane Major*, Docket No. 207-12-97 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999).

Appellant's experience with the lot layout since the 1992 application is a sufficiently changed circumstance to allow appellant to reapply for a lot layout and curb cut similar to that sought and denied at an earlier date. *In re: Appeal of Timberlake Assocs.*, Docket No. 4-1-98 Vtec (Vt. Env'tl. Ct., June 14, 1999).

⁸⁶ Since permit nullification risks a developer's subsequent investment, consider requesting new public notice in proceedings during which a project is altered substantially.

If the hearing was both for the variance and for conditional use approval, the ZBA should have warned the hearing to consider both applications. *In re: Appeal of Annalou Kittell, Leigh D. Kittell, and Ray C. Kittell*, Docket No. 71-4-98 Vtec (Vt. Env'tl. Ct., June 14, 1999).

of a zoning permit renders the permit void from its inception. *In re: Appeal of Ferris K. O'Connell*, Docket No. E95-093 (Vt. Env'tl. Ct., Feb. 27, 1996).

Where a zoning permit was issued instead of a variance and a variance was needed, despite failing to file proper notice for a variance (that would have alerted appellants), appellants had constructive notice of the permit and the size and location of the structure once construction of structure commenced. *In re: Appeal of Partlow*, Docket No. E95-058 (Vt. Env'tl. Ct., Nov. 30, 1995).

The timeliness of suit challenging unpermitted or inadequately permitted construction is open to interpretation. Obviously, a developer whose construction investment may be at risk prefers an early cut-off date. In *In re: Appeal of Partlow*, Docket No. E95-058 (Vt. Env'tl. Ct., Nov. 30, 1995), the Environmental Court rejected an attack initiated about seven years following construction. In *Maurice Callahan & Sons, Inc. v. Cooley*, 126 Vt. 9, 220 A.2d 467 (1966), the Vermont Supreme Court sanctioned an attack initiated within two years after construction.

VI. Appeals

Only “interested persons” who have participated in a municipal regulatory proceeding may appeal decisions rendered in that proceeding.⁸⁷ “Participation in a local regulatory proceeding shall consist of offering, through oral or written testimony, evidence or a statement of

The Environmental Court “is limited to consideration of the matters properly warned before the local board,” *In re: Maple Tree Place*, 156 Vt. 494, 500 (1991); *see also In re: Torres*, 154 Vt. 233, 235 (1990), because “notice and hearing requirements on an application are mandatory and jurisdictional, and failure to adhere to these requirements renders the action taken null and void.” *Appeal of Baker and Johns*, Docket No. 200-10-04 Vtec (Vt. Env'tl. Ct., Mar. 29, 2005).

⁸⁷ 10 V.S.A. § 8504(b)(1).

concern related to the subject of the proceeding.”⁸⁸ Interested persons, a term that is strictly construed, include:

1. A person owning title to property, or a municipality or solid waste management district empowered to condemn it or an interest in it, affected by a bylaw who alleges that the bylaw imposes on the property unreasonable or inappropriate restrictions of present or potential use under the particular circumstances of the case.⁸⁹
2. The municipality that has the plan or bylaw at issue in an appeal brought under this chapter or any municipality that adjoins such municipality.⁹⁰

⁸⁸ 24 V.S.A. § 4471(a). Any interested person who could have brought an appeal to Court as an appellant is entitled to appear in the matter within 14 days of the filing of the Statement of Questions. V.R.E.C.P. 5(b)(2).

Nothing precludes an Appellant from qualifying for “interested person” status under more than one subsection of §4464(b) [now § 4465(b)]. *In re: Emanuel, et al*, Docket No 24-1-00 Vtec (Vt. Env'tl. Ct., Mar. 21, 2000).

Interested parties can intervene as of right within the twenty-day period after receipt of the notice of appeal, but beyond that time period they must move to intervene. The Court will generally allow intervention if no party is prejudiced by the intervention and it does not delay the proceedings. *Appeal of Mitchell*, Docket No. 203-11-04 Vtec (Vt. Env'tl. Ct., June 3, 2005) (citing *In re Appeals of Garen*, 174 Vt. 151, 153-55 (2002)).

Petitions to intervene filed after a trial court decision or a settlement are generally disfavored. Delay by any litigant, including a prospective intervenor, is not allowed to inconvenience or disadvantage another litigant unfairly. Trial courts may grant such petitions, even when filed solely for the purpose of taking an appeal, under appropriate circumstances. The Court looks to when intervenor became aware of litigation, the time elapsed from the filing of the action and the filing of the petition to intervene and the reason for failing to seek intervention earlier. Parties have been allowed to intervene after the trial court order, particularly to pursue an appeal in situations in which the intervenor had relied on the government to protect his interests. *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998); *In re: Appeal of Ernest Paquette*, Docket No. 127-7-97 Vtec (Vt. Env'tl. Ct., Oct. 5, 1998).

When a municipality requires separate applications for preliminary and final site plan approval for a proposed subdivision, a person who qualifies as an interested person must participate in the hearing from which they wish to appeal. Where a woman participates in a preliminary site plan approval hearing, and does not appeal that decision, and her husband, not acting on her behalf, participates in a final site plan approval hearing for the same proposed subdivision, she cannot file an appeal of the final site plan approval. *In re: Appeal of Carroll, et al*, Docket No. 3-1-05 Vtec (Vt. Env'tl. Ct., Aug. 26, 2005).

The fact that the notice of appeal that one individual signed was also signed by another individual who has since been dismissed does not invalidate the first individual's standing as an individual appellant. Nothing in the statute or the rules prevents a number of appellants from filing a single joint appeal, with a single filing fee, even if they all have individual standing. *Appeal of Sparkman*, Docket No. 208-11-04 Vtec (Vt. Env'tl. Ct., Mar. 22, 2005).

It is by no means clear whether Environmental Court has jurisdiction over appeals from selectboard decisions made under 24 V.S.A. Chapter 117, as it does over appeals from ZBA, planning commission and DRB decisions, or whether the scope of that review is *de novo*. *In re: Appeal of Taft Corners Assocs., Inc.*, Docket No. 127-7-98 Vtec (Vt. Env'tl. Ct., Dec. 28, 1998).

⁸⁹ This class of interested persons refers to record owners only and no one else. *Mad River Valley v. Town of Warren Board of Adjustment*, 146 Vt. 126, 499 A.2d 759 (1985); *Town of Sandgate v. Colehamer*, 156 Vt. 77, 589 A.2d 1205 (1990). An optionee, for example, does not qualify as an interested person.

⁹⁰ Neighboring property owners do not qualify for standing under 24 V.S.A. § 4464(b)(2) [now §4465(b)(2)] (or V.R.C.P. 24(a)(2)) if they cannot show the City (on whose side the neighbors intend to intervene) does not

3. A person owning or occupying property in the immediate neighborhood of a property that is the subject of any decision or act taken under this chapter, who can demonstrate a physical or environmental impact on that person's interest under the criteria reviewed, and who alleges that the decision or act, if confirmed, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.⁹¹

adequately represent their positions. *In re: Appeals of Wesco Inc., and Simendinger*, Docket Nos. E96-110 and E96-075 (Vt. Env'tl. Ct., July 24, 1996).

A municipality has no special or automatic standing in zoning appeals, but must qualify as an interested person. *In re: Appeal of Cliffside Leasing*, Docket No. E95-110 (Vt. Env'tl. Ct., Mar. 4, 1996).

A town may appeal a DRB decision only if it claims the town plan or a town bylaw is at issue, not solely based on the wisdom of the decision. *Appeal of Town of Richmond*, Docket No. 44-3-03 Vtec (Vt. Env'tl. Ct., Oct. 7, 2003). *See also In re: Appeal of Edward Deptula*, Docket No. 9-1-00 Vtec (Vt. Env'tl. Ct., May 22, 2000); *In re: Appeal of J.D. Associates*, Docket No. 83-5-99 Vtec (Vt. Env'tl. Ct., Feb. 4, 2002); *Appeal of Adams*, Docket No. 145-9-03 Vtec (Vt. Env'tl. Ct., Feb. 27, 2004); *Appeal of Town of Fairfax*, Docket No. 45-3-03 Vtec (Vt. Env'tl. Ct., Aug. 9, 2005); *Appeal of Mitchell*, Docket No. 203-11-04 Vtec (Vt. Env'tl. Ct., June 3, 2005).

A town has a limited right to bring an appeal from a decision of its zoning board or planning commission if no other interested party has appealed. If another party has appealed the decision of the zoning board or planning commission, the town as well as any other intervening party may participate fully in the *de novo* hearing. *In re: Appeal of Bidwell*, Docket No. E95-040 (Vt. Env'tl. Ct., June 2, 1995); *see also Sabourin v. Town of Essex*, 146 Vt. 419, 505 A.2d 669 (1985).

⁹¹ Under 24 V.S.A. § 4464(b)(3) [now §4465(b)(3)] residents who are in the immediate neighborhood have standing to challenge a proposed project. *In re: Appeal of Dooley; Appeal of Scannell*, Docket Nos. E96-045 and E96-107 (Vt. Env'tl. Ct., Nov. 4, 1996).

The immediate neighborhood is the area affected by a project. *In re: Appeal of Aube-Hinsdale*, Docket No. E95-078 (Vt. Env'tl. Ct., Mar. 8, 1995); *Appeal of Green Meadows Center, LLC, Appeal of Tierne, et al, Appeal of Gilberg, et al*, Docket Nos. 208-12-01, 152-9-01, 179-10-99 Vtec (Vt. Env'tl. Ct., Mar. 25, 2002).

The only sensible way of interpreting "immediate neighborhood" is to look both at the proximity of the appellant to the project on appeal, and to determine if the appellant potentially could be affected by any of the aspects of the project which the zoning laws regulate. *In re: Appeal of Edward Stanak and Joelen Mulvaney*, Docket No. 101-7-01 Vtec (Vt. Env'tl. Ct., Oct. 15, 2001).

An adjacent property owner can potentially be affected by noise, traffic, and use of an applicant's property sufficiently to qualify for standing, regardless of whether the evidence in the case bears out those concerns. *In re: Appeal of Paul and Ellen Growald*, Docket No. 236-10-00 Vtec (Vt. Env'tl. Ct., Nov. 13, 2001).

Where an organization has office, storage, and meeting space in a building in the area of the proposed development, the Court will not find that the organization is an "interested person" because the statutory requirements require more than the casual use of property. *In re: Appeal of Carroll, et al*, Docket No. 3-1-05 Vtec (Vt. Env'tl. Ct., Aug. 26, 2005).

Where an appellant's property is one-tenth of a mile from the subject property and could easily be affected by traffic caused by the proposal to the subject property, the appellant is "in the immediate neighborhood" and has standing to bring the appeal. The Court will view the facts in the light most favorable to the non-moving party. *See Toys Inc. v. F.M. Burlington Co.*, 155 Vt. 44, 48 (1990). *In re: Appeal of Ross*, Docket No. 137-8-04 Vtec (Vt. Env'tl. Ct., Nov. 1, 2005).

Individuals living one mile and two miles from the property subject to the application, who have no view of the subject property, and whose property is separated from the subject property by numerous other parcels and several roads, do not have standing to appeal under 24 V.S.A. § 4464(b)(3) as owners or occupiers of property in "immediate neighborhood" of the property subject to the application. *In re: Appeal of Gulli, et al*, Docket Nos. 135-6-00, 185-8-00, 4-1-01 and 5-1-01 Vtec (Vt. Env'tl. Ct., Mar. 22, 2001).

4. Any ten persons in any combination of voters or real property owners within a municipality listed in subdivision (2) of this subsection who, by signed petition to the planning commission, board of adjustment or the development review board of a municipality, the plan or a bylaw of which is at issue in any appeal brought under this title, allege that any relief requested by a person under this title, if granted, will not be in accord with the policies, purposes, or terms of the plan or bylaw of that municipality.⁹²
5. Any department and administrative subdivision of this state owning property or any interest therein within a municipality listed in subdivision (2) of this subsection, and the agency of commerce and community development of this state.

24 V.S.A. § 4465(b). Interested person status is reviewed only when challenged. Vermont Environmental Court Rule 5(d)(2).

A neighbor has standing to attack on appeal the “decision if confirmed,” not just the permit if granted or denied. *In re: Appeal of Brigham and Ryan*, Docket No. E95-120 (Vt. Env'tl. Ct., Nov. 29, 1995).

To qualify as a party appellant under 24 V.S.A. § 4464(b)(3) [now §4465(b)(3)], the party must own or occupy property in the immediate neighborhood of appellee-applicant’s subdivision and allege that a decision would not be in accord with the policies, purposes or terms of the plan or bylaws. A group as a whole cannot qualify under this subsection for party status. *In re: Appeal of Jericho Center Citizens for Responsible Growth and Thomas J. Baribault*, Docket No. 165-9-98 Vtec (Vt. Env'tl. Ct., May 24, 1999).

⁹² Under 24 V.S.A. § 4464(b)(4) [now §4465(b)(4)] if ten or more people sign petitions initiating each case, they may have standing without meeting the proximity requirement. *In re: Appeal of Dooley; Appeal of Scannell*, Docket Nos. E96-045 and E96-107 (Vt. Env'tl. Ct., Nov. 4, 1996).

If each member of appellant group qualifies for party status under terms of 24 V.S.A. § 4464(b)(4) [now §4465(b)(4)], the fact that such appellant also serves as a member of the ZBA or planning commission does not disqualify that appellant from participation in litigation. *In re: Appeal of Carmen Murray, et al.*, Docket No. 227-12-98 Vtec (Vt. Env'tl. Ct., Mar. 1 and 22, 1999).

Where 25 individuals file an appeal, any subset of that 25, as long as it is at least 10, may have “interested person” status, regardless of the status of any remaining individuals. *Appeal of Osherenko et al.*, Docket No. 79-5-04 Vtec (Vt. Env'tl. Ct., June 22, 2005).

All the Appellants are within the “immediate neighborhood” of Appellees’ property, that is, they could potentially be affected by aspects of Appellees’ property regulated by the City’s zoning ordinance, such as parking, density, and noise, and thus if two Appellants withdraw from the appeal leaving only eight, those eight still have standing. *In re: Appeal of Daniels, et al.*, Docket No. 58-4-99 Vtec (Vt. Env'tl. Ct., Sept. 12, 2000).

Group cannot qualify under 24 V.S.A. § 4464(b) [now §4465(b)] for party status because there is no indication that they ever signed a petition at the local level or even to the Court. *In re: Appeal of Jericho Center Citizens for Responsible Growth and Thomas J. Baribault*, Docket No. 165-9-98 Vtec (Vt. Env'tl. Ct., May 24, 1999).

Persons seeking interested person status under 24 V.S.A. § 4464(b)(4) [now §4465(b)(4)] who file petition with ZBA after it has reached its decision may, under certain circumstances, have their petition granted for the purposes of taking an appeal. *In re: Appeal of Persis Corp. and Recchiuti*, Docket No. E95-122 (Vt. Env'tl. Ct., Apr. 22, 1996).

Appeals of ZBA, development review board and planning commission decisions must be made within thirty (30) days following the decision or the running of the deemed approval period.⁹³ *Mohr v. Village of Manchester*, 161 Vt. 562, 641 A.2d 89 (1993); *In re: Appeal of J.D. Associates*, Docket No. 36-2-00 Vtec (Vt. Envtl. Ct., June 21, 2000); *Harvey v. Town of Waitsfield*, 137 Vt. 80, 401 A.2d 900 (1979). Within reason, the appeal period is tolled with respect to any person not receiving notice required for any decision.⁹⁴ A timely motion to

⁹³ Appeal period begins when a written decision is issued or should have been issued under a deemed approval statute. *In re: Appeal of C.C. Construction Co.*, Docket No. E95-146 (Vt. Envtl. Ct., Feb. 22, 1996).

An appellant may appeal after notice of decision, either oral or written. The appeal period is, however, measured from the date of written decision. *In re: Appeal of Weaver*, Docket No. E95-079 (Vt. Envtl. Ct., Sept. 18, 1995).

Thirty-day appeal period does not begin until the issuance of a written record, a requirement which may be met by the approval and signing of the minutes of the meeting where the decision was made. *Appeal of Julie Guerette and Garret Paquette*, Docket No. 266-12-02 Vtec (Vt. Envtl. Ct., Apr. 14, 2003).

The Environmental Court is without jurisdiction to extend jurisdictional time limits pursuant to V.R.C.P. 6(b). *In re: Rutland City Zoning Permit #96-038; Appeal of Sargeant, et al.*, Docket No. E95-103 (Vt. Envtl. Ct., Oct. 13, 1995).

A zoning board cannot extend jurisdictional limits, even for excusable neglect. *Id.*

Once a DRB or other board makes a decision it can reopen that decision and hear new evidence as long as it is within the 30-day appeal period and that interested parties are appropriately notified. *Appeal of Comi*, Docket No. 95-6-04 Vtec (Vt. Envtl. Ct., Mar. 14, 2005).

After an applicant's application has been adjudicated at the ZBA level and an appeal taken to the Environmental Court, the applicant no longer has the authority unilaterally to withdraw the application (regardless of whether a cross-appeal has been filed). *In re: Appeal of Vermont Institute of Natural Science*, Docket No. 109-7-97 Vtec (Vt. Envtl. Ct., Feb. 1, 1999).

If appellant wishes to withdraw an application for a permit that has issued, the appellant must apply to the ZBA to withdraw the application and vacate the permit, or appellant could have appealed the conditions of the permit to the Court. *In re: Appeal of Jeff Sullivan*, Docket No. 10-1-98 Vtec (Vt. Envtl. Ct., Apr. 13, 1999).

Any appellant or cross-appellant can move under VRCP 41 to withdraw its appeal, but the only route to withdraw the underlying application is to request a remand to the ZBA for it to act on the request to withdraw the underlying application. *Id.*

⁹⁴ Summary judgment granted because ZBA failed to send appellant a copy of the decision, even though he attended hearings as an interested person. *In re: Appeal of Phillip Mayo*, Docket No. 149-8-98 Vtec (Vt. Envtl. Ct., Feb. 24, 1999).

When an interested person entitled to written notice of a ZBA decision is sent the decision after the appeal period has otherwise run, the appeal period should begin to be counted from the date the Town Clerk in fact mailed the decision to him. *In re: Appeal of William Karstens, et al.*, Docket No. 264-11-00 Vtec (Vt. Envtl. Ct., May 23, 2001).

The Vermont Supreme Court has suggested that an interested person who does not receive either written or oral notice of the decision within the appeal period may nevertheless be able to appeal. *In re: Appeal of M.T. Assocs. and Midway Oil Corp.*, Docket No. 192-12-97 Vtec (Vt. Envtl. Ct., Oct. 28, 1998).

reconsider tolls the running of the appeal period for the period of reconsideration.⁹⁵ Cross-appeals can be made within 14 days after appeals. *See Appeal of Charbonneau*, Docket No. 135-8-03 Vtec (Vt. Env'tl. Ct., Oct. 21, 2003). Appeals must be filed by certified mail to the Environmental Court with copies to the municipal clerk or the zoning officer, if so designated. 24 V.S.A. § 4471(c). Within five business days, the town clerk or zoning officer, if so designated, is supposed to supply a list of interested persons to the appellant. Notice of appeal must be sent by certified mail to all interested persons.⁹⁶ V.R.E.C.P. 5(b)(3) specifies the content of Notice of Appeal. Upon motion, all such parties shall be granted leave by the Court to intervene in the appeal. 24 V.S.A. § 4471(c).

Zoning approvals are not effective until the final resolution of appeals. 24 V.S.A. § 4449(a)(3). Upon appeal to the Environmental Court the stay remains for 15 days from the date of filing the appeal with the Court, then expires unless extended by the Court.⁹⁷ 24 V.S.A. § 4449(a)(3). The fact that a developer proceeds without permits is not a basis for denying those permits. *In re Carrier*, 155 Vt. 152, 582 A.2d 110 (1990). Nor is it a basis for granting the permits. *See In re: Appeal of Richard Bove*, Docket No. E95-119 (Vt. Env'tl. Ct., Aug. 30, 1996).⁹⁸

⁹⁵ *In re: Appeal of Jolley Associates*, Docket No. 118-8-01 Vtec (Vt. Env'tl. Ct., Jan. 9, 2004); *In re: Appeal of Independent Wireless One Leased Realty Corp.*, Docket No. 16-1-02 Vtec (Vt. Env'tl. Ct., May 5, 2003); *In re: Application of Rene Pelissier and Brenda Sears*, Docket No. SA 24-95 Fc (Franklin Cty Sup. Ct., Apr. 10, 1996); *In re: Duhl, Boylan, Kiendl, and Gould*, Docket No. E96-035 (Vt. Env'tl. Ct., Apr. 25, 1996).

⁹⁶ Filing a notice of appeal in the land records cannot take the place of the notice to interested parties required by 24 V.S.A. § 4471 and VRCP 76(e). *In re: Appeal of Jericho Center Citizens for Responsible Growth and Thomas Baribault*, Docket No. 165-9-98 Vtec (Vt. Env'tl. Ct., May 24, 1999).

⁹⁷ *See In re: Appeal of Nott*, Docket No. 141-6-00 Vtec (Vt. Env'tl. Ct., Dec. 26, 2000).

⁹⁸ By proceeding with construction while the variance was on appeal, and after being warned by the Court, when a party undertook the risk that they might have to also bear the cost of removing that construction at a later date, the cost of removal of the building should not be deducted from the penalty. *Village of Ludlow v. Kenneth Tofferi and Totem Pole Ski Shop, Inc.*, Docket No. 213-11-98 Vtec (Vt. Env'tl. Ct., Jan. 18, 2002).

Evidentiary hearings on appeal are *de novo*, 24 V.S.A. §§ 4472(a) and 4472(b),⁹⁹ unless a municipality has acted to create a record, permitting on-the-record review.¹⁰⁰ 24 V.S.A. § 4471(a).¹⁰¹ *In re: Appeals of George Dunnett*, Docket Nos. E96-132 and E96-133 (Vt. Env'tl. Ct., Aug. 28, 1997). Nevertheless, the scope of appeal can be limited. The Environmental Court has jurisdiction only of matters arising under Chapters 23, 41, 43, 47, 48, 53, 55, 56, 69, 64, 123, 151, 159, and 201 and sections 922 and 2625 of Title 10 and matters arising under 24 V.S.A. Chapter 117 and Chapter 61, Subchapter 12. 10 V.S.A. § 8503. The Environmental Court has no authority to hear building permit appeals. *In re: Appeal of Feiereisen*, Docket No. E95-074 (Vt. Env'tl. Ct., Oct. 23, 1995).¹⁰² The Environmental Court cannot resolve private property disputes.¹⁰³ Unlike many planning commissions, the Court cannot redesign a site plan or consult

⁹⁹ The Environmental Court is obligated to determine the application *de novo* on the issues that were appealed and may not apply a deferential standard of review to the planning commission decision. *In re: Appeal of Sabin*, Docket No. E95-120 (Vt. Env'tl. Ct., Apr. 15, 1996).

¹⁰⁰ For the reviewing Court to give appropriate deference to the board in on-the-record review, it must be able to tell from the record exactly what evidence was before the board and whether the correct ordinance and statutory standards were applied to that evidence by the board. A record adequate for this type of review cannot be obtained from minutes taken by an individual from that person's notes alone. *In re: Appeals of George Dunnett*, Docket Nos. E96-132 and E96-133 (Vt. Env'tl. Ct., Aug. 28, 1997).

¹⁰¹ *Appeal of McLaughlin*, Docket No. 162-9-04 Vtec (Vt. Env'tl. Ct., Mar. 25, 2005); *Appeal of Village of Morrisville Water and Light Department*, Docket No. 43-3-04 Vtec (Vt. Env'tl. Ct., Dec. 30, 2004); *Appeal of Waters*, Docket No. 186-10-03 Vtec (Vt. Env'tl. Ct., Mar. 17, 2004); *Appeal of Mitchell and Mary Leikert*, Docket No. 132-8-03 Vtec (Vt. Env'tl. Ct., May 3, 2004); *Appeal of Kevin Blakeman*, Docket No. 72-5-03 Vtec (Vt. Env'tl. Ct., Jan. 15, 2004); *Appeal of James Ghia*, Docket No. 31-2-03 Vtec (Vt. Env'tl. Ct., Nov. 19, 2003); *Appeal of Lussier and Noe*, Docket No. 116-5-02 Vtec (Vt. Env'tl. Ct., Sept. 16, 2002); *In re: Appeal of Gulli, et al.*, *Appeal of Dunnett, et al.*, Docket Nos. 4-1-01 and 5-1-01 Vtec (Vt. Env'tl. Ct., Dec. 12, 2001); *In re: Appeal of J.D. Associates*, Docket No. 83-5-99 Vtec (Vt. Env'tl. Ct., May 15, 2001); *In re: Appeals of George Dunnett*, Docket Nos. E96-132 and E96-133 (Vt. Env'tl. Ct., Aug. 28, 1997).

¹⁰² Injunctive relief, attorneys' fees and damages of claimed public trust violations, constitutional violations and statutory notice violations are not available in Environmental Court on an appeal of a planning commission decision. *In re: Appeal of Wright, et al.*, Docket No. 35-2-98 Vtec (Vt. Env'tl. Ct., Dec. 18, 1998).

¹⁰³ Parties must apply to Superior Court for any clarification or modification of order concerning right-of-way or must file a new declaratory judgment action in Superior Court to establish right-of-way more specifically if they cannot agree to it themselves. *In re: Appeal of Herbert P. and Isabelle M. Peterson*, Docket No. E97-024 (Vt. Env'tl. Ct., Dec. 15, 1997).

The Court does not have jurisdiction over private property rights. *Appeal of Bowman*, Docket No. 70-5-96 Vtec (Vt. Env'tl. Ct., June 21, 2005); *see also Harvey & Symmes Final Plat Application*, Docket No. 96-5-05 Vtec (Vt. Env'tl. Ct., Sept. 9, 2005).

with an applicant during the design process. The Court's function is limited to approval or disapproval of the site plan put before it.¹⁰⁴ *In re: Appeal of Brown*, Docket No. E96-156 (Vt. Env'tl. Ct., June 27, 1997). The Environmental Court is without jurisdiction to resolve property

Any litigation regarding the alteration, limitation, or voiding of a Covenant or Warranty Deed must be undertaken in Superior Court. *In re: Appeal of Hildebrand*, Docket No. 228-12-04 Vtec (Vt. Env'tl. Ct., Oct. 13, 2005).

¹⁰⁴ While issues before the Environmental Court are *de novo*, issues may be more limited before the Court than the range of issues that could have been raised before the zoning board or planning commission because the Court's review is appellate in nature. The Court is not a "super planning commission." *In re: Appeal of Richard Bidwell*, Docket No. E95-040 (Vt. Env'tl. Ct., June 2, 1995); *In re: Appeal of Highgate Springs Protective Assn.*, Docket No. 125-8-97 Vtec (Vt. Env'tl. Ct., May 4, 1998); *In re: Appeal of Watker, et al.*, Docket No. 143-9-01 Vtec (Vt. Env'tl. Ct., Jan. 29, 2002); *Appeal of Richard Angelino*, Docket No. 261-11-02 Vtec (Vt. Env'tl. Ct., May 22, 2003); *Appeals of Schneeberger*, Docket Nos. 11-1-04 and 12-1-04 Vtec (Vt. Env'tl. Ct., Sept. 16, 2004).

The Environmental Court must take an application as it is, including the fact that a variance was issued allowing non-conforming lot sizes and rear and side setbacks. *In re: Appeal of Alden C. Ehler*, Docket No. 55-3-00 Vtec (Vt. Env'tl. Ct., Dec. 26, 2001).

The Court may take whatever action on the appealed application as the ZBA could have taken on the application before it. It was open to the applicant, in demonstrating that the change of use would not materially affect any bylaw, standard or applicable permit condition to offer to limit the proposed new retail tenants to non-factory outlet uses. *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998).

Court has authority to do whatever ZBA and planning commission could have done with applications and Court is not bound by their rulings. Court has authority to deny, grant in part or in full and to impose conditions on any approval regardless of whether such conditions were imposed by the ZBA or planning commission. *In re: Appeals of Robert W. Wimble and Carl R. Wimble*, Docket Nos. 105-6-98 and 106-6-98 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999).

Zoning Board of Adjustment must allow appellants to apply for a change in use and a variance and rule on such application before the merits of the application can be considered by the Environmental Court on appeal. *In re: Appeal of Miserocchi*, Docket No. E96-071 (Vt. Env'tl. Ct., Oct. 7, 1996).

Declaratory relief is available in Environmental Court on matters within the Environmental Court's zoning and planning jurisdiction. *Id.*

Environmental Court may consider such modifications to an application as were contemplated by the ZBA when the matter was before it. *In re: Appeal of Ellen Janson*, Docket No. 54-3-98 Vtec (Vt. Env'tl. Ct., Feb. 25, 1999).

Because court considers application *de novo*, the applicant may provide additional evidence in support of his project beyond that provided to the ZBA, as long as the project applied for has not changed substantially from the application. *In re: Appeal of Walter Flatow*, Docket No. 77-4-98 Vtec (Vt. Env'tl. Ct., Apr. 30, 1999).

Terms from agreement were incorporated in town decisions, and Court's rulings on those decisions *de novo* on the merits may turn out to vary from, modify or entirely depart from what was done by ZBA or planning commission, including whether or not to incorporate the agreement's terms and conditions. *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998), *In re: Appeal of Vanderbilt MPD Corp.*, Docket Nos. 110-6-98 and 115-6-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998).

Court has jurisdiction to analyze the constitutionality, as applied, of the planning commission's action under the public notice provisions of the zoning enabling statute and the City's zoning ordinance. *In re: Appeal of Barbara Wright, et al.*, Docket No. 35-2-98 Vtec (Vt. Env'tl. Ct., Dec. 18, 1998).

disputes,¹⁰⁵ although an Environmental Court Judge can be designated to sit as a judge in a superior court case and the two cases consolidated so that they may be resolved efficiently. 4 V.S.A. § 22(a). Moreover, the Court cannot consider additional zoning relief until it is considered below.¹⁰⁶ Rather, the Environmental Court remands cases for resolution of

¹⁰⁵ The Court only has jurisdiction to determine whether the proposal complies with the requirements of the subdivision regulation. The Court has jurisdiction to determine whether the 2004 right-of-way was deeded as a permanent easement or right-of-way and whether it is at least twenty feet wide, a prerequisite under the state statute to development of land with access to a public road via a private road or right-of-way. *Appeal of Teeter*, Docket No. 195-11-03 Vtec (Vt. Env'tl. Ct., Feb. 22, 2005).

Appellant's claims against the town officer should be brought in Superior Court, not Environmental Court. *Appeal of Janet Cote*, Docket No. 257-11-02 Vtec (Vt. Env'tl. Ct., Apr. 11, 2003).

¹⁰⁶ The Court may take whatever action on the appealed application as the ZBA could have taken on the application before it. In demonstrating that the change of use would not materially affect any bylaw, standard or applicable permit condition, it was open to the applicant to offer to limit the proposed new retail tenants to non-factory outlet uses. *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998).

Court has authority to do whatever ZBA and planning commission could have done with applications and Court is not bound by their rulings: Court has authority to deny, grant in part or in full and to impose conditions on any approval regardless of whether such conditions were imposed by the ZBA or planning commission. *In re: Appeals of Robert W. Wimble and Carl R. Wimble*, Docket Nos. 105-6-98 and 106-6-98 Vtec (Vt. Env'tl. Ct., Mar. 1, 1999).

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Terms from agreement were incorporated in town decisions, and Court's rulings on those decisions *de novo* on the merits may turn out to vary from, modify or entirely depart from what was done by ZBA or planning commission, including whether or not to incorporate the agreement's terms and conditions. *In re: Appeal of Manchester Shopping Center, Inc.*, Docket No. 72-4-98, *In re: Appeal of Vanderbilt MPD Corp.*, Docket Nos. 110-6-98 and 115-6-98 Vtec (Vt. Env'tl. Ct., Oct. 13, 1998).

The Environmental Court cannot address new matters on appeal. *In re: Appeal of Dunnnett*, Docket No. E95-039 (Vt. Env'tl. Ct., Aug. 28, 1995).

If the ZBA has ruled a use is not a conditional use and the Court determines that the use is a proper conditional use, the matter should be remanded to the ZBA for it to consider in the first instance and the Court itself shall not impose conditions on that use. *In re: Appeal of Willey*, Docket No. E96-218 (Vt. Env'tl. Ct., July 7, 1997). *See also In re: Appeal of Melissa N. Sullivan*, Docket No. 69-4-00 Vtec (Vt. Env'tl. Ct., Oct. 17, 2000).

An application for a variance would have to be made to the ZBA in the first instance and would not be considered by this Court until or unless the ZBA had ruled and that ruling had been appealed. *In re: Appeal of Casella Waste Management, Inc. and E.C. Crosby & Sons, Inc.*, Docket No. 110-8-99 Vtec (Vt. Env'tl. Ct., Mar. 16, 2001).

In an appeal of a denial of final plat approval by a DRB, where the DRB concluded that the final plat was incomplete, and where requests for waivers from some of the conditions imposed by the DRB were not brought to the DRB as part of the final plat consideration, since the DRB did not rule in the first instance on the waiver

procedural defects rather than resolving them in the first instance.¹⁰⁷ Nor can the court consider issues raised below that have not been raised by a party in its Statement of Questions defining the scope of an appeal or cross-appeal.¹⁰⁸

Evidentiary hearings must be held in the county in which all or a portion of the land subject to appeal is located. 4 V.S.A. § 1001. Within 20 days after the Notice of Appeal is filed, the appellant must file with the Clerk of the Environmental Court a statement of the questions to be determined by the Court. No other pleadings are necessary.¹⁰⁹ Thereafter, the Environmental Court convenes a scheduling conference. V.R.E.C.P. 2(d). A hearing can be scheduled any time

requests, they are not before the Court sitting in place of the DRB in a *de novo* appeal. *In re: Appeal of Lorette Masse*, Docket No. 48-4-01 Vtec (Vt. Env'tl. Ct., Dec. 5, 2001).

¹⁰⁷ Signature by zoning administrator rather than the Chairperson of the Zoning Board of Adjustment, as required by zoning bylaws, does not warrant automatic approval of application. Rather, the matter will be remanded for signature. *In re: Appeal of Mark and Tina Atwood*, Docket No. E95-038 (Vt. Env'tl. Ct., July 3, 1995).

Permit does not issue for violation of 45-day rule where decision issued without supporting findings. Rather, the case should be remanded for findings. The Environmental Court cannot address new issues on appeal. *In re: Appeal of George Dunnnett*, Docket No. E95-039 (Vt. Env'tl. Ct., Aug. 28, 1995).

A case will be remanded for further findings only if they are entirely lacking. *In re: Appeals of Bennington Coalition for the Homeless and North Bennington*, Docket Nos. E95-136 and E96-025 (Vt. Env'tl. Ct., June 7, 1996).

A single finding of fact is sufficient to avoid a remand. *In re: Appeal of Richard Bidwell*, Docket No. E95-040 (Vt. Env'tl. Ct., Sept. 18, 1995).

¹⁰⁸ Court cannot consider the imposition of additional conditions where no cross-appeal was taken. *In re: Appeal of Andersen*, Docket No. E95-075 (Vt. Env'tl. Ct., Oct. 8, 1996).

Without filing a cross-appeal, a party may raise only jurisdictional issues or issues in defense of the appeal. *In re: Appeal of Mattison*, Docket No. E95-045 (Vt. Env'tl. Ct., Aug. 11, 1995).

If no cross-appeal is filed by a party, the party cannot file its own "statement of questions" and the issues on appeal are limited to the statement of questions filed by the appealing party. *In re: Appeal of Carmen Murray, et al.*, Docket No. 227-12-98 Vtec (Vt. Env'tl. Ct., Mar. 22, 1999).

The Court only has properly before it the application made to the zoning board or planning commission. The Court may only consider the issues regarding an application that have been raised in the appeal by any party. *In re: Appeal of Richard Bidwell*, Docket No. E95-040 (Vt. Env'tl. Ct., June 2, 1995).

¹⁰⁹ When a party in an appeal submits a statement of facts and the opposing party submits a "statement of facts not in dispute" but fails to submit any facts that are in dispute, the Court must accept all facts submitted by the moving party as uncontroverted material facts. *Appeal of Taylor's Automotive, LLC*, Docket No. 42-3-04 Vtec (Vt. Env'tl. Ct., Dec. 16, 2005).

To the extent that the "Motion to Clarify" seeks guidance from the Court as to what evidence to present in such future hearing, it must be denied because the decision of what evidence to present is a strategy decision for each party. *In re: Appeals of Clement and Margaret Meunier*, Docket Nos. 150-12-95, 171-10-96 and 90-6-97 Vtec (Vt. Env'tl. Ct., Nov. 13, 1998).

thereafter unless the date is extended as, for example, pursuant to a discovery stipulation.¹¹⁰ In advance of trial, the Environmental Court invites summary judgment motions in permitting legal issues.¹¹¹ Appeals for permits concerning any project may be consolidated for hearing. 10 V.S.A. § 8504(g); V.R.E.C.P. 2(b). Certain judges request proposed findings of fact and conclusions of law during the course of a hearing. It is helpful to these judges if you file these before the hearing begins with a trial memo if possible.

Generally, zoning appeals can be tried about two-to-three months after a notice of appeal is filed. A decision can follow in as little as about two months thereafter.

Decisions of the Environmental Court may be appealed to the Vermont Supreme Court.¹¹² 10 V.S.A. § 8505. Only issues before the Environmental Court may be considered by the Supreme Court. *Id.*

VII. Stays Pending Appeal

Zoning permits that are issued do not take effect until the appropriate time for appeal has run. In the event there is a timely appeal to the appropriate municipal panel, the zoning permit does not take effect until the adjudication of that appeal by the appropriate municipal panel. 24 V.S.A. § 4449(a)(3).

Permits subject to appeal to the Environmental Court are automatically stayed for 15 days. V.R.E.C.P. 5(e). The Environmental Court may further stay the operation of such permits.

¹¹⁰ Discovery in zoning cases is limited only by the Rules of Civil Procedure. *In re: Appeal of New England Eateries*, Docket No. E95-49 (Vt. Env'tl. Ct., Aug. 28, 1995).

¹¹¹ Summary judgment is available in all matters arising in Environmental Court under 24 V.S.A. Chapter 117. *In re: Appeal of Phillip Mayo*, Docket No. 149-8-98 Vtec (Vt. Env'tl. Ct., Feb. 24, 1999). Since the passage of the permit reform bill in 2004, summary judgment is also available in appeals of Act 250 land use permits.

¹¹² Even if an unpublished decision of the Supreme Court carries less weight than does a published one, and even if it has no precedential value, it may be considered by the Court for its persuasive value. *In re: Appeal of Michael Case and Kathleen Michaels*, Docket No. E96-225 (Vt. Env'tl. Ct., Sept. 22, 1997).

10 V.S.A. § 8504(f). Presumably, application for stay will be resolved according to the normal standards. Environmental Court decisions on stay requests may be appealed to the Vermont Supreme Court according to its rules. 10 V.S.A. § 8504(f).

VIII. Penalties for Zoning Non-Compliance¹¹³

Zoning ordinance violations subject violators to fines of not more than \$100 per day.¹¹⁴ 24 V.S.A. § 4451. Action may be brought after seven days' warning by certified mail to the violator. *Id.* The civil penalty in zoning matters is remedial and not punitive. *Town of Goshen v. Bernadette Gionet and Albert Gionet*, Docket No. 43-3-98 Vtec (Vt. Env'tl. Ct., Jan. 5, 1999). Fines are doubled for non-payment. 24 V.S.A. § 4451. Mandamus is available to force municipalities to enforce their zoning bylaws. *In re: Fairchild*, 159 Vt. 125, 616 A.2d 228 (1992).¹¹⁵ Injunctions are also available.¹¹⁶ Zoning permits can be revoked for

¹¹³ Apparently, permits cannot be denied as a penalty for permit violations. *In re: Application of Conner*, 155 Vt. 152, 582 A.2d 110 (1990).

¹¹⁴ Without a showing that applicant was acting on behalf of appellant in applying for or receiving a permit, the terms of the permit cannot be enforced against appellant as the landowner, even though the terms of the ordinance can always be enforced against the landowner. *In re: Appeal of Roxane LaCroix, Trustee of LaCroix Family Limited Partnership Trust*, Docket No. 56-3-98 Vtec (Vt. Env'tl. Ct., Nov. 16, 1998).

¹¹⁵ The Environmental Court does not have jurisdiction, however, over a mandamus action against a Zoning Administrator. *In re: Appeals of Patrick and Donna Halnon*, Docket Nos. 176-10-97, 45-3-98, and 86-5-98 Vtec (Vt. Env'tl. Ct., Oct. 3, 2000). *See also In re: Appeal of Robert and Angela Conrad*, Docket No. 52-3-00 Vtec (Vt. Env'tl. Ct., Apr. 12, 2002).

¹¹⁶ When construction substantially exceeds the scope of a variance and permit the City is entitled to an appropriate mandatory injunction to remove the violation. *In re: Appeal of Foster and Pamela Tucker; City of Vergennes v. Foster and Pamela Tucker*, Docket No 173-8-00 Vtec (Vt. Env'tl. Ct., Dec. 31, 2001) (citing *Town of Sherburne v. Carpenter*, 155 Vt. 126, 582 A.2d 145 (1990) and *In re Letourneau*, 168 Vt. 539, 550-51, 726 A.2d 31 (1998)).

Court does not decide whether noncompliance of 4.4 square-foot portion of new building within setback is sufficiently substantial to warrant an enforcement action, as that determination is for the zoning administrator in the first instance. *In re: Appeals of Clement and Margaret Meunier*, Docket Nos. 150-12-95 and 90-6-97 Vtec (Vt. Env'tl. Ct., May 20, 1999).

Town has not filed an enforcement action. Therefore, Court does not have jurisdiction to direct appellant to remove signs or to impose a fine, plus costs. *In re: Appeal of Burton A. Paquin, Jr.*, Docket No. 149-9-97 Vtec (Vt. Env'tl. Ct., Dec. 7, 1998).

A motion to stay enforcement should be filed in the first instance with the ZBA. The Court should only rule on a stay of enforcement that has been addressed by the local board. *In re: Appeal of East Barre Mobile Home Park, Inc. and Pleasant View Mobile Home Park, Inc.*, Docket No. 152-7-00 Vtec (Vt. Env'tl. Ct., Dec. 10, 2001).

misrepresentation.¹¹⁷ Nevertheless, the nature of the remedy to be sought is discretionary. *Richardson v. City of Rutland*, 164 Vt. 422, 671 A.2d 1245 (1995). There is no independent statutory provision granting attorney's fees in zoning enforcement actions. *Town of Goshen v. Bernadette Gionet and Albert Gionet*, Docket No. 43-3-98 Vtec (Vt. Env'tl. Ct., Jan. 5, 1999).¹¹⁸

IX. Zoning Enforcement¹¹⁹

A. The Law

In 1994, the Vermont Legislature passed a new law allowing municipalities to designate ordinances as either civil or criminal.¹²⁰ If ordinances are designated as civil, violation of them can result in the imposition of fines. Tickets are issued for violations of such ordinances much in the way traffic tickets are given out.

Previously, all local violations were criminal and had to be prosecuted by the local district attorney. Because of the backlog of work in most of the district attorney's offices, municipal violations rarely resulted in any punishment.

¹¹⁷ Sound policy must always reserve to a zoning administrator the authority to revoke a permit for misrepresentation, at least where the permit form warns the applicant that misrepresentation voids the permit. *In re: Appeal of Raney L. Hurlburt, Laurie Hurlburt, Richard Desmarais and Tina Desmarais*, Docket No. 27-2-98 Vtec (Vt. Env'tl. Ct., Feb. 12, 1999).

¹¹⁸ 24 V.S.A. § 4444 [now § 4451] does not provide directly for attorney's fees and costs to the town in an enforcement action. Rather, it provides for a daily penalty. The Court may merely consider the town's costs and attorney's fees as a relevant factor in setting a daily penalty. *Town of Fairlee v. Newton Enterprises, Inc.*, Docket No. 228-2-96 Vtec (Vt. Env'tl. Ct., Oct. 28, 1998). *See also In re: Appeal of Cindy Gagnon*, Docket No. 141-8-99 Vtec (Vt. Env'tl. Ct., Mar. 1, 2000).

Absent a statutory or contractual provision for the award of attorney's fees and costs, or a finding of bad faith sufficient to create an exception to the American Rule, the parties must bear their own costs of litigation. *In re: Appeals of David Jackson & In re: Appeal Gerald and Patricia McCue*, Docket Nos. 165-9-99, 43-2-00 and 190-9-00 Vtec (Vt. Env'tl. Ct., June 8, 2001).

Nothing in zoning statute entitles an intervenor to legal fees and expenses. *In re: Appeal of John H. Falsey*, Docket No. 136-7-98 Vtec (Vt. Env'tl. Ct., Mar. 4, 1999).

Nothing in 24 V.S.A. §§ 4444 [now § 4451], 4445 [now § 4452] or 4470(c) [now § 4470(b)] authorizes injunctive relief or prospective penalties for violations that have not yet occurred (and that may never occur). A new notice of violation is a prerequisite to any such enforcement action under § 4444 [now § 4451]. *In re: Appeal of Jeff Sullivan*, Docket No. 10-1-98 Vtec (Vt. Env'tl. Ct., Apr. 13, 1999).

¹¹⁹ Edward G. Adrian, Esq. contributed to the first draft of this section.

Under 24 V.S.A. § 4451(a), zoning violators are required to receive at least seven days' notice to cure any defects in their property, unless it is a repeat violation.

B. Contesting Violations

People charged with violating an ordinance have the option of electing a hearing before the Traffic Bureau. 24 V.S.A. § 1979 and 4 V.S.A. § 1106 set out the requirements for a hearing by the Bureau. The hearing officer has the power to subpoena witnesses and request the production of records. The hearing officer uses the “clear and convincing evidence” standard to determine whether the municipality has met its burden of proof. 4 V.S.A. § 1106(b).

Parties may appeal to the District Court either “on the record” or *de novo*, if the defendant requests. There is no mandatory right of appeal to the Vermont Supreme Court, as the Supreme Court in its discretion may accept appeals.

¹²⁰ While the material deals solely with zoning violations, the new law is applicable to any municipal ordinance.

ATTACHMENT 1

PLANNING GOALS (AS SET FORTH IN 24 V.S.A. §§ 4302(b) AND (c))

(b) It is also the intent of the legislature that municipalities, regional planning commissions and state agencies shall engage in a continuing planning process that will further the following goals:

(1) To establish a coordinated, comprehensive planning process and policy framework to guide decisions by municipalities, regional planning commissions, and state agencies.

(2) To encourage citizen participation at all levels of the planning process, and to assure that decisions shall be made at the most local level possible commensurate with their impact.

(3) To consider the use of resources and the consequences of growth and development for the region and the state, as well as the community in which it takes place.

(4) To encourage and assist municipalities to work creatively together to develop and implement plans.

(c) In addition, this chapter shall be used to further the following specific goals:

(1) To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.

(A) Intensive residential development should be encouraged primarily in areas related to community centers, and strip development along highways should be discouraged.

(B) Economic growth should be encouraged in locally designated growth areas, or employed to revitalize existing village and urban centers, or both.

(C) Public investments, including the construction or expansion of infrastructure, should reinforce the general character and planned growth patterns of the area.

(2) To provide a strong and diverse economy that provides satisfying and rewarding job opportunities and that maintains high environmental standards, and to expand economic opportunities in areas with high unemployment or low per capita incomes.

- (3) To broaden access to educational and vocational training opportunities sufficient to ensure the full realization of the abilities of all Vermonters.
- (4) To provide for safe, convenient, economic and energy efficient transportation systems that respect the integrity of the natural environment, including public transit options and paths for pedestrians and bicyclers.
 - (A) Highways, air, rail and other means of transportation should be mutually supportive, balanced and integrated.
- (5) To identify, protect and preserve important natural and historic features of the Vermont landscape, including:
 - (A) significant natural and fragile areas;
 - (B) outstanding water resources, including lakes, rivers, aquifers, shorelands and wetlands;
 - (C) significant scenic roads, waterways and views;
 - (D) important historic structures, sites, or districts, archaeological sites and archaeologically sensitive areas.
- (6) To maintain and improve the quality of air, water, wildlife and land resources.
 - (A) Vermont's air, water, wildlife, mineral and land resources should be planned for use and development according to the principles set forth in 10 V.S.A. § 6086(a).
- (7) To encourage the efficient use of energy and the development of renewable energy resources.
- (8) To maintain and enhance recreational opportunities for Vermont residents and visitors.
 - (A) Growth should not significantly diminish the value and availability of outdoor recreational activities.
 - (B) Public access to noncommercial outdoor recreational opportunities, such as lakes and hiking trails, should be identified, provided, and protected wherever appropriate.
- (9) To encourage and strengthen agricultural and forest industries.

- (A) Strategies to protect long-term viability of agricultural and forest lands should be encouraged and should include maintaining low overall density.
 - (B) The manufacture and marketing of value-added agricultural and forest products should be encouraged.
 - (C) The use of locally-grown food products should be encouraged.
 - (D) Sound forest and agricultural management practices should be encouraged.
 - (E) Public investment should be planned so as to minimize development pressure on agricultural and forest land.
- (10) To provide for the wise and efficient use of Vermont's natural resources and to facilitate the appropriate extraction of earth resources and the proper restoration and preservation of the aesthetic qualities of the area.
- (11) To ensure the availability of safe and affordable housing for all Vermonters.
- (A) Housing should be encouraged to meet the needs of a diversity of social and income groups in each Vermont community, particularly for those citizens of low and moderate income.
 - (B) New and rehabilitated housing should be safe, sanitary, located conveniently to employment and commercial centers, and coordinated with the provision of necessary public facilities and utilities.
 - (C) Sites for multi-family and manufactured housing should be readily available in locations similar to those generally used for single-family conventional dwellings.
 - (D) Accessory apartments within or attached to single family residences which provide affordable housing in close proximity to cost-effective care and supervision for relatives or disabled or elderly persons should be allowed.
- (12) To plan for, finance and provide an efficient system of public facilities and services to meet future needs.
- (A) Public facilities and services should include fire and police protection, emergency medical services, schools, water supply and sewage and solid waste disposal.
 - (B) The rate of growth should not exceed the ability of the community and the area to provide facilities and services.

(13) To ensure the availability of safe and affordable child care and to integrate child care issues into the planning process, including child care financing, infrastructure, business assistance for child care providers, and child care work force development.

24 V.S.A. § 4302(b) and (c).

ATTACHMENT 2

PLANNING COMMISSION PLANNING RESPONSIBILITIES AS SET FORTH IN 24 V.S.A. § 4325

Any planning commission created under this chapter may:

- (1) Prepare a plan and amendments thereof for consideration by the legislative body and to review any amendments thereof initiated by others as set forth in subchapter 5 of this chapter;
- (2) Prepare and present to the legislative body proposed bylaws and make recommendations to the legislative body on proposed amendments to such bylaws as set forth in subchapter 6 of this chapter;
- (3) Administer bylaws adopted under this chapter, except to the extent that those functions are performed by a development review board;
- (4) Undertake capacity studies and make recommendations on matters of land development, urban renewal, transportation, economic and social development, urban beautification and design improvements, historic and scenic preservation, the conservation of energy and the development of renewable energy resources and wetland protection. Data gathered by the planning commission that is relevant to the geographic information system established under 3 V.S.A. § 20 shall be compatible with, useful to, and shared with that system;
- (5) Prepare and present to the legislative body recommended building, plumbing, fire, electrical, housing, and related codes and enforcement procedures, and construction specifications for streets and related public improvements;
- (6) Prepare and present a recommended capital budget and program for a period of five years, as set forth in section 4440 of this title, for action by the legislative body, as set forth under section 4443 of this title;
- (7) Hold public meetings;
- (8) Require from other departments and agencies of the municipality such available information as relates to the work of the planning commission;
- (9) In the performance of its functions, enter upon land to make examinations and surveys;
- (10) Participate in a regional planning program;
- (11) Retain staff and consultant assistance in carrying out its duties and powers;

(12) Undertake comprehensive planning, including related preliminary planning and engineering studies; and

(13) Perform such other acts or functions as it may deem necessary or appropriate to fulfill the duties and obligations imposed by, and the intent and purposes of, this chapter.

ATTACHMENT 3

PROCEDURES FOR ADOPTING ZONING BYLAWS

The requirements for adopting zoning bylaws (24 V.S.A. §§ 4441-4442) may be summarized as follows:

1. Approval by the planning commission following at least one public hearing. 24 V.S.A. § 4441. The planning commission is required to prepare an extensive report concerning the change. That report must include findings on how the proposal conforms with the municipal plan, affects affordable housing, and affects future land uses and any planned community facilities. 24 V.S.A. § 4441(c). Planning commission approval is unnecessary if a petition signed by 5% of a municipality's voters supports a proposed amendment.
2. One or more hearings by the legislative body. One hearing must be held within 120 days after the planning commission recommends the change or the change is defeated. The last hearing must be held at least fifteen days after the proposal is last changed. A municipality's legislative body may not make non-germane amendments without submitting them to the planning commission. *In re: Application of Cottrell*, 158 Vt. 500, 614 A.2d 381 (1992).

In urban towns (towns with more than 2,499 people; 24 V.S.A. § 4303(25), (31)), a majority of legislative body approves the change except if a written protest is filed in which case five percent of the voters of the municipality may petition for the full town to address the proposed bylaw in lieu of approval by municipal body.

In rural towns (towns with fewer than 2,500 people; 24 V.S.A. § 4303(25)), zoning changes are approved by legislative body unless the town elects to adopt bylaws by secret ballot of the voters. Zoning changes are effective 21 days thereafter, unless within 20 days of the vote, 5% of the voters petition for the whole municipality to consider bylaw or amendment. In that case, the whole municipality votes on amendment by secret ballot.

ATTACHMENT 4

PLATS AND PROPERTY DESCRIPTIONS

Section 1403 of Title 27 contains rigorous requirements for the preparation of plats as follows:

- (a) Plats filed in accordance with this chapter shall be on sheets 11 inches by 17 inches or 18 inches by 24 inches in size or 24 inches by 36 inches if the town or city has appropriate storage facilities as determined by the town or city clerk.
- (b) Plats filed in accordance with this chapter shall also conform with the following further requirements:
 - (1) Plat sheet materials and the inscriptions and drawings thereon shall conform with material specifications determined by the commissioner of buildings and general services, and shall be chosen for their permanence and clarity.
 - (2) Each survey plat shall contain an inset locus map clearly indicating the location of the land depicted and a legend of symbols used.
 - (3) All lettering and data shall be clearly legible.
 - (4) Plat scale ratios shall be sufficient to allow all pertinent survey data to be shown, and each plat shall contain a graphic scale graduated in units of measure used in the body of the plat.
 - (5) Each plat sheet shall have a minimum one-half inch margin, except the binder side, which shall have a minimum one and one-half inch margin.
 - (6) Each plat sheet shall contain a title area in the lower right-hand corner of the sheet stating the location of the land, scale expressed in engineering units, date of compilation, the name of the record owner as of that date, the land surveyor's certification as outlined in section 2596 of Title 26 and a certification that the plat conforms with requirements of this section. These certifications shall be accompanied by the responsible land surveyor's seal, name and number, and signature.
 - (7) Each survey plat shall contain a graphical indication of the reference meridian used on the survey plat and a statement describing the basis of bearings referenced on the survey plat.

(8) When the plat sheet is produced by a reproduction process, the process shall be identified and certified to by the producer in the margin of the plat sheet. The methods of reproduction and certification shall be determined by the commissioner of buildings and general services. Original plat sheets shall be so identified and certified to by the same process.

Town clerks cannot accept for recording plats not complying with these requirements. 27

V.S.A. § 1406.

After a plat is recorded, deeds can and should refer to the plat. The property description in a deed normally runs like this:

Being a portion of the Property conveyed by the deed from _____ to _____ dated _____ and recorded in the _____ Land Records at Book ____, Page ____. The land and premises herein conveyed are more particularly described as being Lot ____ as shown on a certain plat prepared by _____, dated _____ (and last revised on _____), recorded at Map Book _____, plat _____ of the Land Records.

Optional: Lot ____ may be more particularly described as follows: INCLUDE A METES AND BOUNDS DESCRIPTION

Sometimes one may want to describe something with reference to a “sketch” rather than to a plat. *See 27 V.S.A. Chapter 17.* However, this may not be good title practice especially as Vermont becomes increasingly more formal.

ATTACHMENT 5

HISTORIC PRESERVATION FEDERAL AND STATE INCOME TAX CREDITS

Historic preservation can also be encouraged through the Historic Preservation Tax Credit Program. The Tax Reform Act of 1986 (PL 99-514) included a provision granting a 20% tax credit for the substantial rehabilitation of a historic building used for commercial, industrial or residential rental purposes. To qualify for the tax credit, the building must be a certified historic structure that is either (1) listed individually in the National Register of Historic Places, or (2) is located in a registered historic district having historical significance to that district. Registered historic districts must be listed in the National Register of Historic Places or satisfy state or local criteria that meet the requirements of the National Register. The rehabilitation itself must also be certified as being consistent with the building's historic character.

Certification is issued by the National Park Service through the local State Historic Preservation Officer ("SHPO") in a two-part process. The first part of the certification involves making a determination that the building itself is historic. The second certification involves making a determination that the rehabilitation work itself will enhance the building's historic significance. The SHPO reviews all applications for proper documentation and the appropriateness of the rehabilitation work before sending the application along to the regional National Park Service office for certification.

To qualify for the tax credits, the rehabilitation work must also meet certain IRS requirements. Those requirements necessitate that (1) the building must be used as a depreciable business asset, and not be an owner occupied residence; and (2) the cost of the rehabilitation work must exceed the greater of the building's adjusted basis or \$5,000 within a twenty-four (24)

month period. The adjusted basis is the actual cost of the building, plus any capital improvements that may have already been made, less any depreciation already taken. The expenditure test must be met within twenty-four (24) months of the building's placement in service, or within sixty (60) months if the project is a phased project having written architectural plans and specifications.

If the owner of a rehabilitated historic building sells the building within five (5) years of taking the tax credit, there will be a twenty (20%) percent recapture of the tax credit per year.

For more additional details, contact Nancy Boone, Architecture Section Chief, State Architectural Historian, Vermont Division for Historic Preservation, 135 State Street, Drawer 33, Montpelier, Vermont 05633-1201, (802) 828-3226. She has a booklet published by the Park Service that further describes the process and is available to answer any of your questions.

ATTACHMENT 6

THINGS TO LOOK FOR IN A ZONING ORDINANCE

1. In what zoning district is your property located?

Usually the maps included in the zoning ordinance are so small, it is better to go over this question with the zoning administrator. As a check on this process, consult the map in his or her office.

2. Does your proposal represent a permitted use, a conditional use, or a non-permitted use?

Permitted uses are ones that are allowed. Conditional uses are uses that are permitted applying the standards and procedures set forth in 24 V.S.A. § 4414(3). All other uses are not permitted, except nonconforming uses. 24 V.S.A. § 4412(7).

3. Can you comply with the setback, frontage, bulk, density and height requirements for your district?

Noncomplying structures, also known as nonconforming structures, are defined by 24 V.S.A. § 4303(14) and regulated by 24 V.S.A. § 4412(7).

4. Can you comply with the parking and loading restrictions? 24 V.S.A. § 4414(4).

5. Can you comply with applicable performance standards? 24 V.S.A. § 4414(5).

6. Are there special regulations that apply to your zone?

- a. Planned residential developments;
- b. Planned unit developments are defined by 24 V.S.A. § 4417;
- c. Flood plains. 24 V.S.A. § 4424;

- d. Airport hazard areas. 24 V.S.A. § 4414(1)(C);
- e. Design review districts. 24 V.S.A. § 4414(1)(E);
- f. Historic districts. 24 V.S.A. § 4414(1)(F);
- g. Transfer of development rights. 24 V.S.A. § 4423;
- h. Family child care homes may be single family residences. 24 V.S.A. §§ 4412(5);
- i. Are there greater procedural requirements for larger projects?
- j. Subdivision regulations. 24 V.S.A. § 4418. These include procedures for processing plats, standards for the design and layout of streets, shade trees, public utilities, etc. and waiver conditions. Plat applications must be denied within forty-five days or they are approved. 24 V.S.A. § 4464(b)(1). Permissible conditions include suitable street grade, compliance with construction standards, that the road can be safely used (whatever the reason), suitable monuments are located, parks are provided for (up to 15% of the plat) and that streets are laid out and buildings are constructed to promote energy conservation. 24 V.S.A. § 4418.

ATTACHMENT 7
MAKING YOUR PRESENTATION

If a lawyer is involved with the project, he or she should attend the planning commission hearing. Planning commissions may be more likely to approve projects if they believe an appeal is likely.

In addition, lawyers familiar with the planning process can suggest changes that may eliminate some or all of your opposition. To do so, however, they need to have an accurate view of what the opposition wants. The best way for them to do so is to attend the hearing.

At the hearing, present the overall plan before getting involved in details. It is also useful to prepare a chart showing that you meet all the setback requirements, etc. Highlight concessions made at the request of various people. If people are likely to discuss concessions not made, take their initiative away by discussing these yourself. Explain why the concessions are unworkable.

Often, planning commissions will approve a project subject to certain conditions. Areas in which conditions are specifically authorized include traffic, access, circulation and parking, landscaping and screening and to protect renewable resources. 24 V.S.A. § 4416. Planning commissions can also require surety bonds unless required public improvements have been satisfactorily installed. 24 V.S.A. § 4418. (Question: Can they impose additional requirements?) Moreover, they must act within forty-five days or the project is approved. 24 V.S.A. § 4464(b)(1).

If your project is complex, or if particular conditions of approval are particularly important to you, you should prepare a resolution for their approval. For example, some zoning

ordinances say planning commission approval is good for only two years unless extended by the planning commission. If you know you need an extension, the best way to make sure this issue is considered is to list it as an item in the approval resolution.

ATTACHMENT 8

RULES FOR ENVIRONMENTAL COURT PROCEEDINGS

RULE 1. SCOPE OF RULES

These rules govern the procedure in the Environmental Court created by 4 V.S.A., Chapter 27, in all matters within the original or appellate jurisdiction of the court and the procedure in appeals from the Environmental Court to the Supreme Court. The rules shall be construed and administered to ensure summary and expedited proceedings consistent with a full and fair determination in every matter coming before the court.

RULE 2. GENERAL PROVISIONS

(a) Applicability. This rule applies in all proceedings under these rules, except as modified by provisions of the rules pertaining to particular proceedings.

(b) Coordination of Proceedings. On motion of a party, or on the court's own motion, where the same violation or project involves multiple proceedings that have resulted or may result in separate hearings or appeals in the Environmental Court, or where different violations or projects involve significant common issues of law or fact, the court may advance, defer, coordinate, or combine proceedings and may make other orders that will promote expeditious and fair proceedings and avoid unnecessary costs or delay.

(c) Discovery. Unless the parties otherwise agree, the court in a pretrial order issued under paragraph (d)(3) of this rule shall establish the type, sequence, and amount of discovery available under Rules 26-37 of the Vermont Rules of Civil Procedure, limiting the discovery permitted to that which is necessary for a full and fair determination of the proceeding.

(d) Pretrial Conference and Order.

- (1) The court shall hold a pretrial conference as soon as possible after the filing of the last pretrial memorandum required in a review of an administrative order or the last statement of questions required in an appeal or the time for filing either has passed. The court may hold subsequent conferences, on its own motion or at the request of a party, as necessary to promote the expeditious and fair disposition of the proceeding. Any conference may be scheduled by the court to be held by telephone. All unrepresented parties and counsel for all represented parties must attend all conferences. Unless a party or counsel is excused by the court in advance of the scheduled date, failure to attend a conference may result in sanctions, including dismissal of the appeal or entry of default. The judge shall preside at the initial conference but may assign the case manager to conduct all, or specific portions, of any subsequent conference and report to the judge on any matters agreed upon and any matters in dispute. Motions may be scheduled to be heard at any conference held by the judge, and any conference or motion hearing may be recorded by audiotape or other electronic means with leave of the court.
- (2) At the initial conference, the following matters shall be considered, if applicable, and

appropriate schedules shall be established: (i) the status of any stay that has previously been granted; (ii) issues of intervention and party status; (iii) whether to advance, defer, coordinate, or combine proceedings pursuant to subdivision (b) of this rule; (iv) whether to allow clarification of the statement of questions; and (v) the potential for dismissal of all or some issues or for summary judgment or other disposition of any legal issue or issues before trial. At the initial or any subsequent conference, the following additional matters shall be considered, if applicable: (vi) whether to narrow the issues to be heard; (vii) the appropriate type, sequence and amount of discovery; (viii) the use of prefiled evidence and expert witnesses; (ix) whether a site visit is needed; (x) the use of alternative dispute resolution or other means of expediting the proceeding; and (xi) any other matter necessary to the expeditious and fair disposition of the proceeding. (3) In every case, the court shall issue one or more written orders under Rules 16, 16.2, or 26(f) of the Vermont Rules of Civil Procedure, as appropriate. The order or orders shall, at a minimum: (i) dispose of any issues determined at the conference and set a date for the hearing and disposition of any other pending issues raised; (ii) state the type, sequence, and amount of discovery to be conducted and provide a plan and schedule for the completion of discovery; (iii) affirm a schedule for any alternative dispute resolution process ordered or agreed upon under V.R.C.P. 16.3; (iv) if prefiled evidence is to be used, contain appropriate orders concerning its use; (v) contain appropriate orders concerning the use of expert testimony at trial; (vi) contain appropriate orders governing a site visit, if any is to be conducted; and (vii) contain appropriate orders concerning trial scheduling.

(e) Evidence.

(1) Rules of Evidence. The Vermont Rules of Evidence shall be followed in all matters within the original jurisdiction of the court and in all appeals by trial de novo, except that evidence, not privileged, that is not admissible under the Rules of Evidence may be admitted in the discretion of the court if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

(2) Prefiled Evidence.

(A) Except as provided in subparagraph (B) of this paragraph, prefiled evidence may be admitted as ordered by the court in a pretrial order issued pursuant to paragraph (d)(3) of this rule when a hearing will be expedited and the interests of the parties will not be prejudiced substantially.

(B) Prefiled testimony and related exhibits will be admitted only if the witness is present and available for cross-examination, unless the court and the parties otherwise agree or the witness is unavailable as defined in Rule 804(a) of the Vermont Rules of Evidence.

(3) Site Visits. One or more site visits may be conducted when appropriate to assist the court in rendering a decision.

RULE 3. CIVIL ACTIONS

The following actions within the original jurisdiction of the Environmental Court shall be commenced and conducted as civil actions under the Vermont Rules of Civil Procedure and the

Vermont Rules of Appellate Procedure, so far as those rules are applicable and except as they may be modified by subdivisions (b)-(e) of Rule 2:

- (1) Revocation of state land use permits granted under 10 V.S.A., ch. 151, as provided in 4 V.S.A. § 1001(b).
- (2) Enforcement of final administrative orders of the Secretary as provided in 10 V.S.A. § 8014(a).
- (3) Certain civil ordinance violations relating to enforcement under 24 V.S.A., Chapter 117, as provided in 24 V.S.A. § 1974a(b).
- (4) Enforcement of final municipal solid waste orders as provided in 24 V.S.A. § 2297a(j).
- (5) Actions to recover penalties for violations of bylaws enacted under 24 V.S.A., Chapter 117, as provided in 24 V.S.A. § 4451.
- (6) Actions by municipal administrative officers to prevent, restrain, correct, or abate violations of bylaws enacted under 24 V.S.A., Chapter 117, as provided in 24 V.S.A. § 4452.
- (7) Actions by the Attorney General to challenge the validity of a bylaw or its administration on the grounds that it violates 24 V.S.A. § 4412(1) relating to equal treatment of housing and adequate provision of affordable housing, as provided in 24 V.S.A. § 4453.
- (8) Actions by municipalities or interested persons to enforce decisions of appropriate municipal panels under 24 V.S.A., Chapter 117, by mandamus, injunction, process of contempt, or otherwise, as provided in 24 V.S.A. § 4470(b).
- (9) Any other original action concerning a subject matter within the jurisdiction of the Environmental Court in which the relief sought is not available under other provisions of these rules or by action pursuant to paragraphs (1)-(8) of this rule.

RULE 4. REVIEW OF ENVIRONMENTAL ENFORCEMENT ORDERS

(a) Applicability of Rules.

- (1) This rule applies to review of environmental enforcement orders in the Environmental Court under 10 V.S.A. §§ 8001-8013 and 24 V.S.A. § 2297b and to appeals from the Environmental Court to the Supreme Court in those proceedings.
- (2) The Vermont Rules of Civil Procedure, as modified by Rules 2(b)-(e), and the Vermont Rules of Appellate Procedure apply to all proceedings under this rule except as otherwise provided in paragraph (3) of this subdivision and except where another procedure is expressly provided by subdivisions (b)-(e) of this rule.
- (3) The following provisions of the Vermont Rules of Civil Procedure shall not apply to proceedings under this rule: Rules 3 (Commencement of Action), 4 (Process), 4.1 (Attachment), 4.2 (Trustee Process), 7(a) and (c) (Pleadings Allowed), 8(a)-(f) (General Rules of Pleading), 9 (Pleading Special Matters), 10 (Form of Pleadings), 12 (Defenses and Objections), 13 (Counterclaim and Cross-Claim), 14 (Third-Party Practice), 18 (Joinder of Claims and Remedies), 22 (Interpleader), 23 (Class Actions), 23.1 (Derivative Actions), 24(a)(2) (Nonstatutory Intervention as of Right), 24(b)(2) (Nonstatutory Intervention by Permission), 38-39 (Jury Trials), 40(b) (Progress Calendar), 47--49 (Jurors and Juries), 51 (Argument of Counsel);

Instructions to Jury), 53 (Masters), 56 (Summary Judgment), 57 (Declaratory Judgments), 64 (Replevin), 68 (Offer of Judgment), 72 (Appeals from Probate Courts), 74 (Appeals from Decisions of Governmental Agencies), 75 (Review of Governmental Action), the last sentence of Rule 77(d) (Lack of Notice of Entry), 80.1 (Foreclosure of Mortgages and Judgment Liens), 80.2 (Naturalization of Aliens), 80.4 (Habeas Corpus), 80.5 (District Court Procedures for Civil License Suspensions and Penalties for DWI), 80.6 (Judicial Bureau Procedures), 80.7 (Procedures for Immobilization or Forfeiture Hearings Pursuant to 23 V.S.A. § 1213c), and 80.8 (Transfer from District to Superior Court).

(b) Assurances of Discontinuance. An assurance of discontinuance filed pursuant to 10 V.S.A. § 8007(c) shall be deemed a pleading by agreement pursuant to Rule 8(g) of the Vermont Rules of Civil Procedure. Assurances shall be simultaneously filed with the court and the Attorney General. The court may sign the assurance with or without a hearing. If the assurance is signed by the court, the assurance shall become a judicial order and the court shall notify the Secretary, the respondent and the Attorney General. Notwithstanding Rule 60 of the Vermont Rules of Civil Procedure, within ten days of the date that an assurance is signed by the court, the Attorney General may move the court to vacate the order on the grounds that the assurance is insufficient to carry out the purposes of 10 V.S.A., Chapter 201. After hearing, upon finding that the assurance is insufficient to carry out the purposes of Chapter 201, the court shall vacate the order.

(c) Emergency Orders.

(1) Procedure for Issuance. Upon presentation of an emergency administrative order to the court pursuant to 10 V.S.A. § 8009(b), if the court finds that the Secretary has made a sufficient showing that (A) a violation presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or (B) an activity will or is likely to result in a violation which presents an immediate threat of substantial harm to the environment or an immediate threat to the public health; or (C) an activity requiring a permit has been commenced and is continuing without a permit, an emergency judicial order may be issued pursuant to 10 V.S.A. §§ 8008 and 8009. Rule 65(a) of the Vermont Rules of Civil Procedure shall provide the procedure governing issuance of these orders, except that: (i) an affidavit but no complaint is required; (ii) the affidavit must establish and the court must find that all reasonable efforts have been made to notify the respondent of the presentation of the order to the court, and, if so, the court may allow the presentation to be made ex parte; (iii) any order, including an order issued ex parte, may, if the court so orders, continue in effect until further order of the court; and (iv) the order need only state the grounds upon which it has been granted, that the respondent has the right to a prompt hearing on the merits of the order, that the hearing must be requested by motion filed within five days of receipt of the order, that the order will remain in effect until further order of the court or a date provided, and the address or addresses where the motion must be filed. At any hearing on an application for an emergency order, the court may permit either party to present evidence. Any evidence so received that would be admissible upon the hearing on the merits becomes part of the record and need not be repeated upon the hearing on the merits.

(2) Effect; Service. An emergency judicial order shall become effective on actual notice to the respondent. The Secretary shall cause the order to be served upon the respondent.

(3) Hearings on Modification or Dissolution; Stay. If a motion requesting a hearing on the merits of the order is filed with the court and the Secretary by the respondent within five days of the receipt of the order, the court shall schedule a prompt hearing, which shall take precedence over all other hearings and shall be held within five days of filing of the motion. The court may affirm, modify or dissolve the order. The filing of a motion does not operate as a stay of the order, but the court may, upon motion, stay or modify the order upon such terms and conditions as it deems appropriate. Subdivision (d) of this rule shall govern the hearing and any resulting appeal, except that paragraph (2) of that subdivision is inapplicable and a pretrial conference will be held only in the discretion of the court. The court's ruling on a motion filed under this paragraph shall be deemed a final judgment.

(d) Procedure for Review of Administrative Orders.

(1) Generally. This subdivision governs request for review of any order issued by the Secretary pursuant to 10 V.S.A. § 8008, except as otherwise provided for emergency orders issued pursuant to 10 V.S.A. § 8009 and subdivision (c) of this rule.

(2) Notice of Request; Stay. Review of an order of the Secretary shall be taken by filing a notice of the request with the clerk of the Environmental Court and with the Secretary within fifteen days of receipt of the order or decision. The notice operates as a stay of an order issued, and payment of any penalty imposed, under 10 V.S.A. § 8008 pending the hearing. The court also may hear and determine a motion for an emergency order under subdivision (c) of this rule with regard to the alleged violation that is the subject of the proceeding under this subdivision.

(3) Intervention. Upon timely motion under Rule 24 of the Vermont Rules of Civil Procedure, the court may grant party status to an aggrieved person as provided in 10 V.S.A. § 8012(d).

(4) Scheduling; Discovery; Pretrial Proceedings.

(A) As soon as the Secretary receives proof that an administrative order has been served upon a respondent, the Secretary shall file the order and proof of service with the court.

(B)

(i) Within 7 days of the filing of a notice of request for hearing, the Secretary shall file a pretrial memorandum which shall include a list of witnesses and a summary of any evidence which the Secretary plans to present in support of the administrative order.

(ii) Within 10 days of the filing of the Secretary's memorandum, the respondent shall file a pretrial memorandum which shall state respondent's agreement or disagreement with each element of the "statement of facts" in the administrative order; shall include a list of witnesses and a summary of any evidence which respondent plans to present to contest such facts; shall state with particularity whether respondent accepts or contests each element of the "order" section of the administrative order; if a penalty was imposed by the order, shall include a summary of any evidence respondent plans to present regarding mitigating or other factors affecting the penalty calculation; and shall include a

preliminary statement of the legal and jurisdictional issues which respondent plans to raise in the proceeding.

(C) The court shall promptly thereafter convene a pretrial conference, and shall thereupon issue appropriate orders, including orders for the disposition of legal issues prior to the hearing, orders for discovery necessary to a full and fair determination of the proceeding, and other appropriate orders consistent with 10 V.S.A. § 8012, as provided in Rule 2(d).

(5) Trial De Novo; Judgment. Review shall be de novo, but, if a violation is found, the court's review of the remedy imposed shall be subject to 10 V.S.A. § 8012(b). The final judgment in a ruling under this subdivision or paragraph (3) of subdivision (c) may, as appropriate under each specific subsection of 10 V.S.A. § 8012(b), affirm, reverse, modify, or dissolve the decision of the Secretary or may vacate and remand the case for further proceedings consistent with the order of the court. In addition to the requirements of Rule 52 of the Vermont Rules of Civil Procedure, the judgment shall contain the statements required by 10 V.S.A. § 8012(c)(4) and (5).

(6) Appeal to Supreme Court; Stay Pending Appeal.

(A) A final judgment under this rule shall be appealable as of right to the Supreme Court pursuant to 10 V.S.A. § 8013(c). The notice of appeal shall be filed within ten days of the date of receipt of the judgment appealed from.

(B) Notwithstanding Rule 62 of the Vermont Rules of Civil Procedure and Rule 8 of the Vermont Rules of Appellate Procedure, an appeal to the Supreme Court by the Secretary shall stay the dissolution of an emergency judicial order. An appeal by the respondent or the Attorney General shall not stay the operation of an emergency or other order but shall stay payment of a penalty. A respondent may seek a stay in the Supreme Court pursuant to Rule 8 of the Vermont Rules of Appellate Procedure.

(e) Procedure for Review of Final Municipal Solid Waste Orders.

(1) Generally. This subdivision shall govern requests for review under 24 V.S.A. § 2297b of a final solid waste order issued by the legislative body of a municipality pursuant to 24 V.S.A. §§ 2297a.

(2) Notice of Request; Stay. Review of a municipal solid waste order shall be taken by filing a notice of the request with the clerk of the Environmental Court and with the municipal clerk within ten days of receipt of the final order. The notice operates as a stay of any order issued, and payment of any penalty imposed, pending the hearing.

(3) Hearing. Review shall be de novo and shall be governed by paragraph (d)(5) of this rule, substituting "legislative body" for "Secretary."

(4) Judgment. The court may reverse, affirm, modify, or vacate the order in accordance with 24 V.S.A. § 2297b(c), (d). In making its determination, the court shall consider the factors set forth in 24 V.S.A. § 2297a(a).

(5) Appeals; Stay on Appeal. Appeals from Environmental Court decisions under this rule are governed by the Vermont Rules of Appellate Procedure. On an appeal of a final judgment under this rule, Rule 62 of the Vermont Rules of Civil Procedure and Rule 8 of the Vermont Rules of Appellate Procedure shall govern stays, and the decision of the Environmental Court on all matters other than penalties shall be deemed to be judgments in an action for an injunction for purposes of those rules.

RULE 5. APPEALS

(a) Applicability of Rules.

- (1) This rule governs appeals to the Environmental Court from an act or decision of an appropriate municipal panel pursuant to 24 V.S.A. §§ 4471, 4472; from an act or decision of the secretary of the agency of natural resources, or a commissioner or department of the agency, under the provisions of law listed in 10 V.S.A. § 8503(a); from a district commission, or from a district coordinator jurisdictional opinion, under 10 V.S.A., ch. 151; and from decisions of the secretary of the agency of agriculture, food and markets pursuant to 6 V.S.A. §§ 4855, 4861.
- (2) Except as modified by this rule and by subdivisions (b)-(e) of Rule 2, the Vermont Rules of Civil and Appellate Procedure, so far as applicable, govern all proceedings under this rule.

(b) Notice of Appeal.

- (1) Filing the Notice of Appeal. An appeal under this rule shall be taken by filing with the clerk of the Environmental Court by certified mail or other means a notice of appeal containing the items required in paragraph (3) of this subdivision within 30 days of the date of the act, decision, or jurisdictional opinion appealed from, unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure. The appellant shall pay to the clerk with the notice of appeal any required entry fee. If a notice of appeal is mistakenly filed with the tribunal appealed from, or the Natural Resources Board, or either of its panels or its predecessor boards, the appropriate officer of the tribunal, board, or panel shall note thereon the date on which it was received and shall promptly transmit it to the clerk of the Environmental Court, and it shall be deemed filed with the Environmental Court on the date so noted. Failure of an appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal but is ground only for such action as the court deems appropriate, which may include dismissal of the appeal.
- (2) Cross- or Additional Appeals. If a timely notice of appeal is filed, any other person entitled to appeal may file a notice of appeal within 14 days of the date on which the statement of questions is required to be filed pursuant to Rule 5(f), or within the time otherwise prescribed by this rule, whichever period last expires, unless the court extends the time as provided in Rule 4 of the Vermont Rules of Appellate Procedure.
- (3) Contents of Notice of Appeal. The notice of appeal must specify the party or parties taking the appeal and the statutory provision under which each party claims party status; must designate the act, order, or decision appealed from; must name the court to which the appeal is taken; and must be signed by the appellant or the appellant's attorney. In addition, the notice of appeal must give the address or location and a description of the property or development with which the appeal is concerned and the name of the applicant for any permit involved in the appeal. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.
- (4) Service.

(A) Appeal from an Appropriate Municipal Panel. Upon the filing of a notice of appeal from an act or decision of an appropriate municipal panel, the appellant shall at the same time mail a copy of the notice of appeal to the clerk or other appropriate officer of the panel. Upon receipt of the copy of the notice of appeal, the clerk or other officer shall, within five working days, provide to the appellant a list of interested persons, with instructions to serve a copy of the notice upon each of them by certified mail. A copy of the notice shall thereupon be served by the appellant by certified mail upon each interested person.

(B) Appeal from the Secretary of the Agency of Natural Resources, a District Commission, or a District Coordinator. Upon the filing of a notice of appeal from an act or decision of the secretary of the agency of natural resources, a district commission, or a district coordinator, the appellant shall serve a copy of the notice of appeal in accordance with Rule 5 of the Vermont Rules of Civil Procedure upon the secretary, district commission, or district coordinator as appropriate and upon any party by right as defined in 10 V.S.A. § 8502(5), the Natural Resources Board, and every other person to whom notice of the filing of an appeal is required to be given by 10 V.S.A. § 8504(c) or (e), as appropriate. In addition, if the appeal is from an act or decision of the secretary or a district commission, the appellant shall publish a copy of the notice of appeal not more than 10 days after serving the notice as required under this subparagraph, at the appellant's expense, in a newspaper of general circulation in the area of the project which is the subject of the act or decision appealed from.

(C) Appeal from the Secretary of Agriculture. If the appeal is from a decision of the secretary of the agency of agriculture, food and markets under 6 V.S.A. § 4855, the appellant shall serve a copy of the notice of appeal upon the secretary. If the appeal is from a decision or ruling of the secretary under 6 V.S.A. § 4861, the appellant shall serve a copy of the notice upon the secretary, the applicant if other than the appellant, and any person entitled under rules adopted by the secretary to receive individual notice of an animal waste permit hearing pursuant to 6 V.S.A. § 4858.

(c) Appearance. An appellant enters an appearance by filing a notice of appeal as provided in subdivision (b) of this rule. Any other person may enter an appearance within 20 days after the date on which notice of filing of the last notice of appeal to be filed was served, or, if necessary, published pursuant to subparagraph (b)(4)(B) of this rule, by filing a written notice of appearance with the clerk and by serving the notice of appearance in accordance with Rule 5 of the Vermont Rules of Civil Procedure; provided that any person enumerated in 10 V.S.A. § 8504(n)(1)-(3) may file and serve an appearance in a timely fashion. Any other person who has not previously entered an appearance as provided in this paragraph may enter an appearance by filing a timely motion to intervene.

(d) Claims and Challenges of Party Status.

(1) Appeals of Interlocutory District Commission Party Status Decisions. Any party in a proceeding before a district commission, or any person denied party status in such a proceeding, may move in the Environmental Court for an appeal of an interlocutory decision of the district commission granting or denying party status pursuant to 10 V.S.A. § 6085(c). The motion, together with a notice of appeal, must be filed and served as

provided in subdivision (b) of this rule within ten days after the decision of the district commission appealed from, except that the motion and notice need not be served by publication. The court may grant the motion and hear the appeal if it determines that review will materially advance the application process before the district commission. The court shall expedite hearing and determination of the motion and appeal. The provisions of Rule 2 apply to appeals under this paragraph only as ordered by the court.

(2) Claims and Challenges of Party Status in an Appeal from a Final Decision. An appellant who claims party status as a person aggrieved pursuant to 6 V.S.A. § 4855 or 10 V.S.A. § 8504(a) and is not denied that status by 10 V.S.A. § 8504(d)(1), or an appellant who claims party status as an interested person pursuant to 10 V.S.A. § 8504(b)(1), will be automatically accorded that status when the notice of appeal is filed unless the court otherwise determines on motion to dismiss a party. An appellant who claims party status under 10 V.S.A. § 8504(b)(2), (d)(2), or (e)(2) and who has not sought interlocutory relief pursuant to paragraph (1) of this subdivision must assert that claim by motion filed with the notice of appeal. Any other person who appears as provided in paragraph (1) of this subdivision will be accorded party status unless the court otherwise determines on its own motion, on motion to dismiss a party, or on a motion to intervene.

(e) Stay. Unless the act or decision appealed from is automatically stayed pursuant to 10 V.S.A. § 8504(f)(1) by the filing of the appeal or a stay has been granted by the district commission pursuant to 10 V.S.A. § 6086(f), the court, after the notice of appeal has been filed may, on its own motion, or on motion of a party, stay the act or decision and make such other orders as are necessary to preserve the rights of the parties upon such terms and conditions as are just. When the appeal is from the issuance of a permit pursuant to 24 V.S.A. § 4449, unless the decision appealed from is automatically stayed pursuant to 10 V.S.A. § 8504(f)(1)(B), the permit shall not take effect until the earlier of 15 days from the date of filing of the notice of appeal or the date of a ruling by the court under this subdivision on whether to issue a stay.

(f) Statement of Questions. Within 20 days after the filing of the notice of appeal, the appellant shall file with the clerk of the Environmental Court a statement of the questions that the appellant desires to have determined. The statement shall be served in accordance with Rule 5 of the Vermont Rules of Civil Procedure. No response to the statement of questions shall be filed. The appellant may not raise any question on the appeal not presented in the statement as filed, unless otherwise ordered by the court in a pretrial order entered pursuant to subdivision (d) of Rule 2. The statement is subject to a motion to clarify or dismiss some or all of the questions.

(g) Trial De Novo; Pretrial Order. All appeals under this rule shall be by trial de novo, following a pretrial conference and order issued pursuant to subdivision (d) of Rule 2, except as provided in subdivision (h) of this rule. In an appeal by trial de novo, all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from.

(h) Appeals to the Environmental Court on the Record.

(1) From an Appropriate Municipal Panel.

(A) An appeal from an appropriate municipal panel from which appeals may be on the record pursuant to 24 V.S.A. §§ 4471 and 4472 shall be governed by Rules 10-12.1 of the Vermont Rules of Appellate Procedure so far as applicable and except as modified by this rule. The record on appeal shall consist of the original papers filed with the municipal panel; any writings or exhibits considered by the

panel in reaching the decision appealed from; the electronic recording of the proceedings certified by the presiding officer of the municipal panel as the full, true and correct record of the proceedings; and the transcript of the proceedings if any. Within 30 days after the filing of the notice of appeal, the clerk or other appropriate officer of the municipal panel shall transmit the papers and exhibits filed to the clerk of the Environmental Court in the manner provided in Rule 11(b) of the Rules of Appellate Procedure. Except as hereinafter provided, the electronic recording will serve without transcript as the record of the proceedings on appeal in all matters in which the total elapsed time for all recorded proceedings does not exceed 12 hours. In such a case, the operator of the equipment shall send a copy of the electronic recording to the Environmental Court and shall bill the appellant for the copy.

(B) In any such matter in which a party has ordered a transcript and has agreed to pay the cost of copies of the transcript for opposing parties and, unless otherwise ordered by the court, in any matter in which the total elapsed time for all recorded proceedings exceeds 12 hours, the transcript, ordered and prepared as provided in subparagraph (C) of this paragraph, will serve as the record of proceedings.

(C) When a transcript is to be ordered, the party ordering it, within ten days after filing the notice of appeal, shall send to the municipal panel an order for a transcript of all parts of the proceedings that are relevant to the issues that the appellant intends to raise in the statement of questions. A copy of the order shall be served on the clerk of the Environmental Court and all persons upon whom copies the notice of appeal have been served pursuant to subdivision (b) of this rule. It shall thereupon be the responsibility of the municipal panel to cause a transcript to be made by an individual on a list appointed by the Court Administrator pursuant to paragraph (8) of Administrative Order No. 19 to transcribe electronic recordings for use in court proceedings. The party ordering the transcript shall pay to the municipal panel at the time of ordering the deposit amount required under Administrative Order No. 28.

(2) From the Commissioner of Forests, Parks, and Recreation. An appeal from a decision of the commissioner of forests, parks, and recreation under 10 V.S.A. § 2625(f) shall be on the record of the proceedings before the commissioner. Within 30 days after the filing of the notice of appeal, the commissioner shall transmit the papers and exhibits filed to the clerk of the Environmental Court in the manner provided in Rule 11(b) of the Rules of Appellate Procedure. If those proceedings have been electronically recorded, the provisions of paragraph (1) of this subdivision concerning electronic recording apply.

(i) Remand for Reconsideration. At the request of the tribunal appealed from, the court, at any time prior to judgment, may remand the case to that tribunal for its reconsideration.

(j) Judgment. The order of the court may affirm, reverse, or modify the decision of the tribunal appealed from, may remand the case for further proceedings consistent with the order of the court, and may expressly set forth conditions and restrictions with which the parties must comply.

(k) Appeals to the Supreme Court.

(1) Rules Applicable. Except as modified by this subdivision, the Vermont Rules of Appellate Procedure, so far as applicable, shall govern all proceedings under this subdivision.

(2) Filing and Service. An appeal from a decision in a proceeding in the Environmental Court under this rule shall be taken by filing with the clerk of the Environmental Court a notice of appeal in the form provided in paragraph (3) of this subdivision within 30 days of the date of the decision appealed from, unless the Environmental Court extends the time as provided in Rule 4 of the Rules of Appellate Procedure. The appellant shall pay to the clerk of the Environmental Court any required entry fee with the notice of appeal. The appellant shall serve a copy of the notice upon the clerk of the Supreme Court and upon counsel of record of each person that appeared in the Environmental Court and held party status at the time when the decision appealed from was rendered.

(3) Contents of Notice of Appeal. The notice of appeal must specify the party or parties taking the appeal; must designate the judgment, order, or part thereof appealed from; must name the court to which the appeal is taken; and must be signed by the appellant or the appellant's attorney. In addition, the notice of appeal must give the address and a description of the property or development with which the appeal is concerned and the name of the applicant for any permit involved in the appeal and must set forth facts showing that the appellant is entitled to appeal pursuant to 10 V.S.A. § 8505(a)(1) or (2) or shall be accompanied by a motion requesting the Supreme Court to allow the appeal on the grounds specified in 10 V.S.A. § 8505(a)(3).

(4) Issues on Appeal. An objection that was not raised before the Environmental Court may not be considered by the Supreme Court, unless the failure or neglect to raise that objection is excused by the Supreme Court because of extraordinary circumstances.

(5) Interlocutory Decisions. An appeal from a decision of the Environmental Court granting or denying party status as provided in subdivision (d) of this rule or issuing a stay pursuant to subdivision (e) of this rule may be taken before final judgment as provided in Rule 5 of the Vermont Rules of Appellate Procedure.

RULE 6. DEFINITIONS

(a) Unless specified to the contrary, or indicated otherwise in the context:

(1) The words "court," "judge," or similar terms, when used in these rules and in provisions of the Vermont Rules of Civil and Appellate Procedure incorporated in these rules shall mean the Environmental Court or one of the judges of that court.

(2) The word "clerk" when used in these rules and in provisions of the Vermont Rules of Civil and Appellate Procedure incorporated in these rules shall mean the clerk of the Environmental Court.

(3) The words "case manager" when used in these rules shall mean a case manager provided to the Environmental Court pursuant to 4 V.S.A. § 1001(f).

(4) The word "tribunal" means an officer, agency, department, board, panel, or other body from which an appeal lies under these rules.

(b) Other terms used in these rules shall have the meanings ascribed to them in 6 V.S.A. §§ 4802, 4861; 10 V.S.A. §§ 8002, 8502; and 24 V.S.A. §§ 4303, 4465(b).

RULE 7. TITLE

These rules may be known and cited as the Vermont Rules for Environmental Court Proceedings.

RULE 8. EFFECTIVE DATE

(a) Effective Date. These rules will take effect on February 21, 2005. They govern all proceedings in actions or appeals brought after they take effect and also all further proceedings in actions or appeals then pending, except to the extent that in the opinion of the court their application in a particular action or appeal pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) Effective Date of Amendments. Amendments to these rules will take effect on the day specified in the order adopting them. They govern all proceedings in actions or appeals brought after they take effect and also all further proceedings in actions or appeals then pending, except to the extent that in the opinion of the court their application in a particular action or appeal pending when they take effect would not be feasible or would work injustice, in which event the former procedure applies.

ATTACHMENT 9

COMPARISON OF 24 V.S.A. CHAPTER 117 BEFORE AND AFTER 2004 PERMIT REFORM¹²¹

Pre-2004 Reform Section	Heading or Description of Contents	As Currently Codified Section¹²²
§4401	Purpose and Authority	§4401
§4401(a)(2)	Development Review Boards	§4460(a)
§4401(b)(1)	Zoning Regulations	§4411(a)
§4401(b)(2)	Subdivision Regulations	§4418
§4402	Purposes	Omitted
§4403	Preparation of Bylaws	§4441
§4404	Adoption of Bylaws	§4442
§4404a	Adoption of Capital Budget	§4443
§4405	Zoning Districts	§4411(b)
§4406(1)	Existing Small Lots	§4412(2)
§4406(2)	Required Frontage	§4421(3)
§4406(3)	Home Occupations	§4421(4)
§4406(4)	Equal Treatment of Housing	§4412(1)
§4407	Permissible Regulations (generally)	§4414
§4407(1)	Ag, Rural-Residential, Forest, Recreation	§4414(1)(B)
§4407(2)	Conditional Uses	§4414(3)
§4407(3)	Planned Residential Development	Omitted
§4407(4)	Parking and Loading Facilities	§4414(4)
§4407(5)	Site Plan Approval	§4416
§4407(6)	Design Control Districts	§4414(1)(E)
§4407(7)	Performance Standards	§4414(5)
§4407(8)	Bonds for Restoration of Site	Omitted ¹²³ [§4464(b)(4)]
§4407(9)	Flood Plain Areas, Special Control	Omitted
§4407(10)	Airport Hazard Area	§4414(1)(C)
§4407(12)	Planned Unit Development	§4417
§4407(13)	Renewable Energy Resources	§4414(6)
§4407(14)	Time-Share	§4414(10)
§4407(15)	Historic Districts and Landmarks	§4414(1)(F)
§4407(16)	Transfer of Development Rights	§4423

¹²¹ This comparison was based largely on the excellent and tireless work of Fred Dunnington, a member of the 2004 Chapter 117 Revision Committee.

¹²² As codified as of April 15, 2006.

¹²³ The original regulation dealt specifically with bonds that could be required of sand, gravel, or soil extraction permittees to ensure the rehabilitation of the site when the extraction has ended. Bonds are dealt with in the new regulations in a section dealing with bonds that could be required of a developer to ensure that streets and other infrastructure are actually built. 24 V.S.A. §§ 4417(c)(5), 4464(b)(4), and for wireless telecommunications facilities, 24 V.S.A. § 4414(12).

§4407(17)	Technical Review	§4440(d)
§4407(18)	Moratorium relating to Wireless Facilities	Omitted ¹²⁴
§4407(19)	Wireless Communication Facilities	§4414(12)
§4407(20)	Stormwater Management and Control	§4414(9)
§4408(a)	Definitions relating to Nonconformities	(generally) §4303
§4408(a)(1)	Nonconforming Use	§4303(14)
§4408(a)(2)	Nonconforming Structure	§4303(15)
§4408(b)	Nonconformities	§4412(7)
§4408(c)	Mobile Home Park	§4412(7)(B)
§4409	Limitations on Municipal Bylaws	(generally) §4413
§4409(a)	Regulation of Public Facilities	§4413(a) ¹²⁵
§4409(a)(1)	Regulation of Public Utility Power Plant	§4413(b)
§4409(a)(2)-(7)	List of public facilities	§4413(a)(1)-(6)
§4409(b)	More Restrictive Statute Applies	§4413(c)
§4409(c)	Development near State-owned Land	Omitted
§4409(d)	Limitations – residential care home	§4412(1)(G)
§4409(e)	Limitations – Height of Certain Structures	§4412(6)
§4409(f)	Limitations – family child care home	§4412(5)
§4409(g)	Limitations – Forest Management	Omitted
§4410	Interim Bylaws	§4415
§4411	Regulation of Shorelands	§4414(1)(D)
§4411(b) & (d)	Authority to Adopt & Effect on Bylaws	Omitted
§4412	Regulation of Flood Hazard Areas	(generally) §4424
§4412(a)	Purpose	§4424(2)(A)
§4412(b)	Definitions	(generally) §4303(8)
§4412(b)(1) & (2)	“Flood Hazard Area” & “Base Flood”	§4303(8)
§4412(b)(3)	“Floodway”	§4303(8)(B)
§4412(b)(4)	“Floodproofing”	§4303(8)(A)
§4412(b)(5)	“New Construction”	§4303(8)(D)
§4412(b)(6)	“Substantial Improvement”	§4303(8)(E)
§4412(c)	Authority to Adopt Bylaws	Omitted
§4412(d)	Contents of Bylaws	§4424(2)(B)
§4412(e)	Effect on Zoning Bylaws	§4424(2)(C)
§4412(f)	Mandatory Provisions	§4424(2)(D)
§4412(g)	Temporary Bylaws	Omitted
§4412(h)	Variances - renamed “Special Exceptions”	§4424(2)(E)
§4413	Subdivision Regulations	§4418
§4414	Approval of Plats	§4418(2)(B); §4463
§4415	Decisions	§4464(b)(1)
§4416	Plat, Record	§4463(b)
§4417	Requirements by Planning Commission or DRB	§4418(1)
§4418	Conditions to Plat Approval	§§ 4418(2); 4464(b)(4)
§4419	Bond Term and Forfeiture	§4464(b)(6)
§4420	Fees	§4440(b)

¹²⁴ Though there is no provision in the revision for this specifically, it is possible that it is authorized by § 4410, Regulatory Implementation of the Municipal Plan, for which there is no parallel in the old statute.

¹²⁵ There was some ambiguity in the old statute regarding how much regulation a municipality could have regarding public facilities. See *In re Dept. of Buildings and General Services*, 2003 VT 92, 176 Vt. 41, 838 A.2d 78. This ambiguity seems to have been alleviated by the new statute which specifically enumerates only those elements that a municipality can regulate.

§4421	Acceptance of Streets and Improvements	§4463(c)
§4422	Official Map	§4421(1)
§4423	Effect of Approved Plats on Official Map	§4421(2)
§4424	Status of Mapped Public Facilities	§4421(3)
§4425	Building on Properties with Mapped Public Facilities	§4421(4)
§4426	Capital Budget and Program	§4430
§4427	Eligibility to Apply for Permits	§4450
§4441	Bylaws; Effect of Adoption	§4446
§4442	Appointment and Powers of Administrative Officer	§4448
§4443	Zoning Permits	§4449
§4444	Enforcement; Penalties	§4451
§4445	Enforcement; Remedies	§4452
§4445a	Challenges to Housing Provisions in Bylaws	§4453
§4446	Administration; Finance	§4440(a)
§4447	Public Hearing Notice	§4444
§4448	Availability of Documents	§4445
§4449	Local Act 250 Review	§4420
§4461(a)	BOA or DRB	§4460(b)
§4461(b)	BOA or DRB	§4460(c)
§4461(c)	BOA or DRB	§4460(d)
§4462	Procedure	§4461
§4463	Expenditures	§4461(c)
§4464	Appeals	§4465
§4465	Notice of Appeal	§4466
§4466	Stay of Enforcement	Omitted ¹²⁶
§4467	Hearing on Appeal	§4468
§4468	Appeal; Variances	§4469
§4469	Official Map; Permits	§4421(4)(A)
§4470(a)	Decisions on Appeal	§4464(b)(1) ¹²⁷
§4470(b) & (c)	Decisions on Appeal	§4470(a) & (b)
§4471	Appeal to Environmental Court	§4471
§4472	Exclusivity of Remedy	§4472
§4473	Purpose; Limitation	§4473
§4474	Clerk's Certificate	§4447
§4475	Appeals; Planning Commission Decisions	Omitted ¹²⁸
§4476	Formal Review of Planning Commission Decisions	§4476
§4490	Construction of Chapter	§4480
§4491	Saving Clause	§4481
§4492	Severability	§4482

¹²⁶ A stay of the issuance of the permit is automatic now through the appeal period to the DRB and for 15 days following an appeal to the Environmental Court unless the Court issues a stay. This language is in the revised § 4449(a)(3).

¹²⁷ Section 4464(b)(1), which refers to the "appropriate municipal panel," appears to replace both the old § 4415, which refers to the "planning commission or DRB," and the old § 4470(a), which refers to the "BOA or DRB."

¹²⁸ Though this specific section is omitted it appears that appeals of planning commission decisions are covered by the language "appropriate municipal panel" in § 4470.

§4493	Applicability of Subdivision Regulations	Omitted
§4494	Construction; Limitation	§4483
§4495	Agricultural and Silvicultural Practices	§4413(d)
§4496	Enforcement; Limitations	§5545